



Durham E-Theses

Legal Rhetoric in Plato and Aristotle

KONCZOL, MIKLOS

How to cite:

KONCZOL, MIKLOS (2013) *Legal Rhetoric in Plato and Aristotle*, Durham theses, Durham University.
Available at Durham E-Theses Online: <http://etheses.dur.ac.uk/9485/>

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in Durham E-Theses
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full Durham E-Theses policy](#) for further details.

Legal Rhetoric in Plato and Aristotle

Miklós Könczöl

Abstract

This thesis deals with certain aspects of Aristotelian rhetoric, its relationship to earlier and contemporary authors, in particular to Plato, and its influence on Hellenistic rhetoric. The focus is on the theory of judicial rhetoric throughout.

In Chapter I, a reconstruction of Plato's view of rhetoric is intended to set the background against which the characteristic traits of Aristotelian judicial rhetoric will be examined. It is argued that Plato is consistently hostile towards 'ordinary' rhetoric, i.e. rhetoric that is aimed at persuasion and accessible to the citizens of the *polis* without restrictions. He finds no place for this kind of rhetoric in a properly functioning society.

Chapter II focuses on Aristotle's appraisal of judicial rhetoric: its possible function and relative value. The main contention of the chapter is that unlike Plato, Aristotle regards rhetoric as useful for eliciting just decisions. Aristotle does not, as often argued, limit the task of the courtroom orator to the discussion of facts, nor does he consider judicial rhetoric inferior to the deliberative branch.

Chapter III looks at what Aristotle calls the specific arguments of judicial rhetoric. Its aim is to clarify the theoretical tenets underlying the legal arguments discussed in the *Rhetoric* as well as their structure and way of functioning. It is argued that most of these arguments focus on the problem of intention, which also explains some of the links among them and how they allow for a smooth transition between questions of facts and lawfulness.

Chapter IV revisits the problem of Aristotelian influence on later judicial rhetoric, in particular on Hermagoras' theory of issues (*staseis*). It examines the ways in which issues appear in the *Rhetoric* and compares them to their counterparts in the *Rhetorica ad Alexandrum* and Hermagoras' (reconstructed) system, highlighting the points where Aristotle may have inspired later doctrine.

Legal Rhetoric in Plato and Aristotle

Miklós Könczöl

(Ustinov College)

Thesis submitted to

Durham University

Department of Classics and Ancient History

for the degree of
Doctor of Philosophy

2013

The copyright of this thesis rests with the author. No quotation from it should be published without the author's prior written consent and information derived from it should be acknowledged.

VXORI CARISSIMÆ

Table of Contents

Acknowledgements.....	iii
Introduction.....	1
1 Judicial Rhetoric before Plato and Aristotle.....	3
2 Aims and Scope.....	7
Chapter I: Plato on Judicial Rhetoric.....	10
Introduction.....	10
1 The <i>Gorgias</i>	12
1.1 The Argument of the <i>Gorgias</i>	13
1.2 Gorgias' Definition.....	17
1.3 Socrates' Analogies.....	20
1.4 The Power of Public Speaking.....	24
1.5 Justice and Judgement.....	27
1.6 Conclusion.....	32
2 The <i>Phaedrus</i>	34
2.1 The Argument of the <i>Phaedrus</i>	35
2.2 Rhetoric Redefined.....	39
2.3 What Remains of Public Speaking?.....	44
3 The <i>Laws</i>	51
3.1 The Persuasive Lawgiver.....	54
3.2 The Second Best Constitution and (the Lack of) Judicial Oratory.....	64
3.3 Conclusion.....	71
Chapter II: Aristotle's View of Judicial Rhetoric.....	74
Introduction.....	74
1 The Possibility of Forensic Oratory.....	82
1.1 'Showing the Facts'.....	88
1.2 The Judge and the Legislator.....	98
1.3 Facts to Law: The Nature of 'Legal' Arguments.....	101
2 Aristotle on the Value and Function of Judicial Rhetoric.....	107
2.1 The Comparison of Deliberative and Judicial Rhetoric.....	107
2.2 The Branches of Rhetoric.....	113
2.3 Isocrates on Deliberative and Judicial Rhetoric.....	119
Conclusion.....	126
Chapter 3: Arguments of Judicial Rhetoric in Aristotle.....	129
Introduction.....	129
1 Definition and Reasons of Wrongdoing.....	129
2 Pleasure, Wrongdoers and Victims.....	131
2.1 The Mental Element.....	131

2.2 The Wrongdoer's Considerations	133
3 Just and Unjust Actions.....	134
4 Legal Definition.....	136
5 Fairness.....	140
5.1 Fairness in the <i>Nicomachean Ethics</i>	141
5.2 <i>Epieikeia</i> in Plato	143
5.3 Fairness and Definition in the <i>Rhetoric</i> : Aristotle's Example	146
5.4 Topics of Fairness	155
5.5 <i>Epieikes</i> and Extensive Interpretation.....	165
5.6 Fairness in Practice	168
6 Topics of Magnitude (Chapter 14).....	175
7 Non-technical Proof in Judicial Rhetoric	178
7.1 Laws	179
7.2 Witnesses.....	184
7.3 Contracts	185
7.4 Testimonies of Slaves.....	187
7.5 Oaths	188
Conclusion.....	189
Chapter IV: The Analysis of Legal Issues.....	193
Introduction.....	193
1 Issues in the <i>Rhetoric</i>	198
1.1 The Distinction between Facts and Qualities.....	199
1.2 Common and Specific Questions of the Three Branches of Rhetoric	201
1.3 Issues in Judicial Argumentation	205
1.4 The Role of Issues in the Arrangement of the Speech.....	210
1.5 <i>Nomika zētēmata</i>	216
2 Possible Aristotelian Influences on Hermagoras' Doctrine of Issues.....	219
2.1 Issues in the <i>Rhetorica ad Alexandrum</i>	220
2.2 <i>Krinomenon</i>	228
2.3 Sub-Categories of Quality and Aristotle's Judicial Arguments.....	232
Conclusion.....	236
Conclusion.....	241
1 Plato and Aristotle.....	241
2 Theory and Practice.....	244
3 Influences.....	246
Bibliography	248
Abbreviations	248
Works Cited	249

Acknowledgements

Research for this work was made possible by a Durham Doctoral Fellowship awarded by Durham University and, in my fourth year, a Lósy Research Grant at Pázmány Péter Catholic University, Faculty of Law, which also granted me a research leave for my time in Durham.

Edward Harris went well beyond what can be expected from a supervisor in terms of generosity, scholarly and otherwise. His advice, criticism and patience have been invaluable in shaping my project and bringing it to completion. My secondary supervisor, George Boys-Stones was always ready to read and discuss chapters of my thesis. Phillip Horky and István H. Szilágyi offered useful comments on what is now the first chapter of the thesis.

I wish to thank Péter Cserne, Máté Paksy, and Szilárd Tattay, my friends and colleagues, for their enduring support and encouragement. Two consecutive Heads of the Department of Legal Philosophy at Pázmány Péter Catholic University, Csaba Varga and János Frivaldszky kindly endorsed my research from the beginning.

Quite a few years ago, at the start of another project abroad, someone expressed doubts over my plans, since, he wrote, ‘learning and having a family are two separate ways of life’. I have been fortunate enough to experience the contrary. For this, and their trust, support and patience I am grateful to my family: my parents, my children, and most of all to my wife. This work is dedicated to her.

Introduction

This thesis is about legal rhetoric in Plato and Aristotle: a topic often touched upon, but seldom discussed on its own right in scholarship. This, to be sure, may not be against the intention of the two authors. Plato does everything he can to persuade his readers that there is no place for rhetoric, whatever it is, in legal argumentation. Aristotle has a different aim. He wants to offer a textbook on rhetoric without the shortcomings of previously published works in that genre, and one of these shortcomings, he states, is the exclusive treatment of judicial rhetoric. Thus, perhaps both of them would be happy to see that the emphasis in modern research is on the political aspect of rhetoric, with its relations to law and legal argumentation discussed almost exclusively within that framework.

Another reason for the relative absence of scholarly interest may be the lack of a specialised scholarly community. In the introduction to the second edition of his translation of Aristotle's *Rhetoric*, George Kennedy distinguishes the four main groups of readers and their respective interests:¹ classical philologists interested in the history of the text, scholars of ancient philosophy focusing on the philosophical ideas underlying Aristotle's rhetorical doctrine, teachers of composition and speech communication who read it as a contribution to a general theory of rhetoric, and literary scholars and critics looking at concepts relevant for their field. This description seems to be quite exact (although Kennedy rightly emphasises that there are many overlaps between and differences within the groups). Those interested in the legal aspects of the *Rhetoric* may be even fewer than literary critics, who make the 'fourth and smallest group'. Yet even within this fifth and

¹ Kennedy (2007) 19–20.

even smaller group, at least two approaches seem to appear more or less separately. Perhaps more traditionally, jurists have read the *Rhetoric* to find in it the reflections of Aristotle's position on questions of legal philosophy, in addition to what can be read in his ethical works. The other sub-group is that of legal historians,² whose (more recent) interest is in the comparison of Aristotelian doctrine with evidence from the Attic orators and elsewhere. As a further group, scholars of rhetoric and argumentation may be mentioned: they have much to say in terms of legal argumentation, yet their most important contribution is not specifically 'legal', as it consists in pointing out the very relevance of Aristotle's doctrine for the field of today's legal discourse.

This thesis, the title of which might just as well be 'legal rhetoric in and around Aristotle', shares much with these latter groups, in terms of the questions raised as well as methodology. First of all, it falls into the genre of 'history of ideas'. In this sense, comparisons with Plato or (to a more limited extent) Isocrates are inevitable. It is mainly this aspect of the work that justifies the presence of a whole chapter devoted to Plato's views of rhetoric. Secondly, parts of the reconstruction of Aristotle's ideas heavily draw on insights gained by legal historians. Parallels from legal history are important for the understanding of Aristotle's attitude to the topics he discusses and also to see where his ideas actually come from. Thirdly, some technical aspects of legal argumentation will be examined within the framework of Aristotle's theory as well as against a background of the history of rhetoric.

² It should be noted, however, that the two groups were not always so clearly separated. While the distinction today mostly follows the divide between disciplines (ancient legal historians being, with very few exceptions, ancient historians and classicists, and jurists mainly having a background in law or social philosophy), the long-standing tradition of 'historical jurisprudence' did not keep the two perspectives apart. On the approach of historical jurisprudence in general see e.g. Vinogradoff (1920) and a historical overview of Berman (1994). On Greek law from that perspective, see Vinogradoff (1922).

By way of introduction, I shall first give a brief summary of what can be known about judicial rhetoric before Plato and Aristotle, then an overview of the questions discussed in the chapters that follow.

1 Judicial Rhetoric before Plato and Aristotle

While the earliest Greek sources about oratory and persuasion³ cover a wider range of rhetorical situations, those concerning the beginnings of rhetorical doctrine and instruction explicitly link these to legal disputes. Two stories of apparently different origin have been preserved about the first Sicilian teachers of rhetoric, Corax and Tisias. One of them is told by Cicero in his *Brutus*, with reference to Aristotle (12.46). According to that story, the emergence of the new discipline was due to the fact that after the end of tyranny in Sicily, private legal disputes, which had been suspended for a while, could be taken up again, which in its turn aroused a considerable demand for efficient techniques of speaking in court.⁴ Corax and Tisias would have been the first to offer such a course, with course material published in a written form. The second story comes from Sextus Empiricus and is about a dispute between Corax and one of his pupils, who refused to pay the instruction fee.⁵ Cicero explicitly mentions Aristotle as his source and Sextus says his story is widely told (φερομένη παρὰ τοῖς πολλοῖς, 2.96).⁶ In neither case do they make any reference to a pre-Aristotelian source, but what matters here is that

³ For a selection see Radermacher (1951) A I–IV.

⁴ See Navarre (1900) 4–9 on the possible historical circumstances.

⁵ SE *M.* 2.97–99. Before the court Corax argued that since he agreed not to ask for money in case the pupil loses his first legal case, it is necessary that the latter pays the fee, for either Corax wins and is therefore entitled to the payment, or the pupil wins his first case and thus the condition of the waiver does not obtain. The pupil put forth the same argument in a reverse form: either he wins and therefore does not have to pay, or he loses his first case and Corax has to keep his promise.

⁶ Kennedy (2007) 298 follows the view of Radermacher (1897), who suggests Timaeus of Tauromenion as a possible source from the 3rd century BC.

both authors suggest some link between early rhetorical doctrine and legal disputes.

These stories do not provide details about the contents of their instruction,⁷ but we find both Plato and Aristotle criticising earlier and contemporary textbooks, essentially for three reasons. First, these works focus on judicial rhetoric and neglect other domains of rhetorical practice. Second, their primary interest is in the parts of the speech. Third, they prefer apparent to real arguments and non-rational to rational persuasion.

The textbooks' preoccupation with the structure and form of speeches is ridiculed by Socrates in Plato's *Phaedrus* (266d 7–267a 2),⁸ where a standard doctrine of five parts of the speech (prooemium, narration, witnesses, signs, probabilities) is mentioned together with the work of Theodorus of Byzantium, who seems to have distinguished further parts, such as 'supplementary proof', 'refutation', and 'supplementary refutation'. This is clearly the structure of a judicial speech,⁹ and one of Aristotle's claims will be that not every kind of speech has to be constructed in the same way (*Rh.* 1414a 37–b 7).¹⁰

As for the means of persuasion, textbook authors are said to have neglected proof, and enthymemes in particular, which Aristotle regards as the 'body of persuasion' (1354a 15, cf. 1355a 3–7), and preferred non-rational means, such as stirring up the emotions of the judges (see e.g. 1354a 16–18, 24–25, b 20). Plato also

⁷ On the possible contents of the earliest textbook, see Navarre (1900) 14–19.

⁸ References to Plato's works are to Stephanus pages and the line numbers of Burnet's (1900–1907) OCT edition, except for the *Gorgias*, where line numbers of Dodds' (1959) edition are given.

⁹ Cf. Kennedy (1963) 56. Theodorus' distinction between proof and refutation is linked to the roles of the litigants (ὡς ποιητέον ἐν κατηγορίᾳ τε καὶ ἀπολογίᾳ, 267a 1–2).

¹⁰ References to Aristotle's works are to Bekker pages and the line numbers of the OCT editions, and follow the text of the latter, unless explicitly mentioned.

distrusts the use of arguments from probability,¹¹ which he attributes to Tisias and Gorgias (*Phdr.* 267a 6–7).

In addition to the comprehensive textbooks, another, more theoretically oriented approach to rhetorical studies is mentioned in the sources.¹² Its main exponents may have been sophists like Protagoras, whose interest in the meaning of words (see *Phdr.* 267c 4–7)¹³ may have been part of a more general interest in speaking and persuasion,¹⁴ or Prodicus, whose opinion on the ideal length of a speech is also reported by Plato (*Phdr.* 267b 1–5).¹⁵

Thirdly, rhetorical collections and model speeches are distinguished from the textbooks on the one hand and the theoretical approach on the other.¹⁶ The former consist of stock phrases or commonplaces, as probably Euenus' 'incidental censures' (παραψόγοι, *Phdr.* 267a 4–5), Thrasymachus' *Eleoi* (Arist. *Rhet.* 1404a 12), but sometimes even whole parts of speeches, such as Demosthenes' *Prooimia dēmēgorika*. Model speeches, such as those of Gorgias or Antiphon's *Tetralogies* were composed by teachers of rhetoric and given to their pupils as course material

¹¹ Aristotle takes a more nuanced position on this question, see ch. III, sect. 2 below.

¹² On the link between textbooks and the rhetorical interest of the sophists, see Fuhrmann (1960) 122–137.

¹³ See also DK 80 A 26, and cf. Kerferd (1981) ch. 7.

¹⁴ See also Kennedy (1963) 13–14. For a selection of relevant testimonies, see Radermacher (1951) B III. Plato at *Prt.* 318e 5–319a 2 makes him claim that unlike other sophists, he teaches useful things: τὸ δὲ μάθημά ἐστιν εὐβουλία περὶ τῶν οἰκείων, ὅπως ἂν ἄριστα τὴν αὐτοῦ οἰκίαν διοικοῖ, καὶ περὶ τῶν τῆς πόλεως, ὅπως τὰ τῆς πόλεως δυνατώτατος ἂν εἴη καὶ πράττειν καὶ λέγειν.

¹⁵ For further testimonies see Radermacher (1951) B VIII. On the sophists' interest in rhetoric, see e.g. Kerferd (1981) ch. 8, based mainly on Gorgias' speeches.

¹⁶ Cf. Kennedy (1963) 54, and 74, pointing out that '[t]he *Phaedrus* may be divided into two parts which correspond strikingly to the two methods of rhetorical instruction current in classical Greece. From the beginning to 257b6 is principally a small collection of specimen speeches. From 257b7 to the end is a theoretical discussion analogous to a rhetorical handbook, which touches, often critically, upon the usual topics, including the definition of rhetoric, its parts, and forms of argument.' On the distinction between textbooks/treatises and model speeches, see Arist. *SE* 183b 26–184a 8, where he mentions Tisias, Thrasymachus and Theodorus as exponents of the former, and Gorgias for the latter.

to be discussed in class, perhaps also to be learned, and certainly imitated.¹⁷

This distinction, of course, is one of works rather than authors. The same person might discuss theoretical issues, and write a textbook as well as model speeches at the same time. Quite often, it is impossible to know anything but the title of a lost work, and hence to discern which genre it belonged to.¹⁸

It is nevertheless more than probable that judicial rhetoric was in the focus of the textbooks. Kennedy mentions some possible reasons for this. On the one hand, legal argumentation and the structure of judicial speeches was something that could be formalised more easily than political (or even epideictic) oratory. On the other hand, the format of textbooks may have been more adequate for meeting the popular demand for relatively cheap and easily accessible instruction in judicial rhetoric.¹⁹

It seems, then, that Plato's and especially Aristotle's criticism does not apply to the whole of earlier and contemporary rhetorical theory. What they comment on is a specific current of rhetorical instruction: that of the textbooks which were sold as quick-and-easy introductions to the art of persuasion. Apparently, these textbooks focused on the composition of complete speeches (for forensic use), and followed the structure of such speeches, also discussing the corresponding means of persuasion, such as the ways of arousing emotions or arguments from probability.

We might conclude that the criticism of the textbooks serves different aims in Plato and Aristotle. Plato rejects both the textbooks and the sophistic approach to persuasion: the first as completely irrelevant, the second as harmful. Aristotle, in

¹⁷ The latter is insinuated by Socrates who finds Phaedrus reading a speech of Lysias. See n. 79 and accompanying text below.

¹⁸ On the ambiguity of the word *technē*, see e.g. Cole (1991) 81–94, with a survey of early *technai*.

¹⁹ Kennedy (1963) 57–58.

turn, actually continues the textbook tradition by composing one himself,²⁰ even though that may have been a different kind of textbook: one meant to be read by his students only.²¹ He does so, however, by broadening the scope of the work in two directions. On the one hand, he includes everything he considers relevant for a general theory of rhetorical argumentation. On the other hand, he includes material he collected for his other (political, ethical etc.) works, which then serves as the basis of his topics.

2 Aims and Scope

The thesis falls into four parts. Chapter I gives an overview of Plato's views on judicial rhetoric as formulated in some of his dialogues. By reconstructing the arguments set forth by Aristotle's teacher and predecessor, it is also intended to set the background against which the characteristic traits of Aristotelian judicial rhetoric are examined in the two chapters that follow. The main questions of the chapter are whether Plato finds any place for 'ordinary rhetoric', i.e. the practice and doctrine of oratory (as experienced by him in contemporary Athens), and whether he offers any alternative to it in the form of some kind of a 'philosophical rhetoric'. For the first question, it is the *Statesman* and the *Laws* that seem the most relevant of the dialogues. For the second one, the most obvious candidates are the *Gorgias* and the *Phaedrus*. The chapter follows the presumable chronology of the works,²² beginning with the *Gorgias* and finishing with the *Laws*. This order of

²⁰ Cf. Fuhrmann (1960) 138. Like Fuhrmann, I prefer to look at the *Rhetoric* as part of the textbook tradition rather than something essentially different, as suggested by Cole (1991), see e.g. x–xi.

²¹ Cf. Clayton (2004).

²² On the chronology of Plato's works, see e.g. Thesleff (1982) and (1989), Brandwood (1990), Kahn (2003). In the case of the four above works, it seems fairly safe to assume, some controversies about the dating of single works notwithstanding, a relative chronology, according to which the *Gorgias* was written first (c. 380), then the *Phaedrus* (c. 370–360), and finally the *Statesman* and the *Laws* (c.

discussion also allows to see whether theories about the development of Plato's views of rhetoric²³ can be maintained or need some qualification.

Chapter II focuses on Aristotle's appraisal of judicial rhetoric: its possible function and its value as compared to the other branches of rhetoric. After a brief overview of the links between Aristotle's rhetorical studies and Plato's Academy, the first question raised here concerns the interpretation of a passage in the introductory chapter of Book I of the *Rhetoric*, 1354a 26–31, which is usually taken to reflect a rather restrictive view in terms of legal argumentation. After examining the question of whether orators according to Aristotle may legitimately address issues other than facts, in the second half of the chapter I turn to the problem of relative value of the branches of rhetoric. Here, a comparison is made between the treatment of each of the three branches within the *Rhetoric* on the one hand, and between Aristotle's and Isocrates' views concerning judicial rhetoric on the other.

Chapter III looks at the specific arguments of judicial rhetoric as described in Book I, Chapters 10 to 15 of the *Rhetoric*. The aim of the chapter is to clarify the theoretical tenets underlying the legal arguments discussed by Aristotle as well as their structure and the way they are meant to function. For Chapters 10–13, the focus is on the role played by the concept of intention, which seems to provide a common perspective for the different types of arguments described in these chapters, and to explain how these can be linked to one another and why they allow for a smooth transition (suggested in the previous chapter) between questions of facts and lawfulness. Special attention is paid to the interpretation of the passages on fairness (*to epieikes*) as well as their links to other works (such as the *Nicomachean Ethics* or Plato's *Laws*) and contemporary judicial oratory.

355–347).

²³ For an historical overview on the notion of Plato's development, see Taylor (2003).

Chapter IV revisits the problem of Aristotelian influence on later judicial rhetoric, and on the so-called theories of issues (*staseis*) in particular. Given the scarcity of direct evidence concerning early Hellenistic rhetorical tradition, it is mainly by way of comparison that the possibility of any influence can be examined. The first part of the chapter surveys what may be regarded as Aristotelian ‘issues’ in the *Rhetoric* to see what function Aristotle attributes to them. The second part compares these to their counterparts in the *Rhetorica ad Alexandrum* on the one hand and the (reconstructed) system of *staseis* developed by Hermagoras of Temnos on the other, to identify the possible content of a common source of Aristotle and Anaximenes and, through that, the elements of Hermagoras’ doctrine that may stem from Aristotle.

The four chapters of the thesis can be grouped in different ways, corresponding to the problems that guide the following investigations. The first such problem is Plato’s influence on Aristotelian rhetoric, which suggests a contrast, but also a link, between chapter I and chapters II–IV. A second division, of two plus two chapters, is suggested by a purely theoretical and a more technical focus, respectively: after the reconstruction of Plato’s and Aristotle’s views of the feasibility, value, and function of rhetoric, the second part goes into some of the specific problems of legal argumentation. Thirdly, the transition between chapters III and IV is one between the Platonic-Aristotelian problematic and that of the (earlier and later) textbooks. Instead of separation, however, the last chapter concentrates on the possible links and influences that connect what is often regarded as two distinct traditions.

Chapter I: Plato on Judicial Rhetoric

Introduction

Plato's attitude to rhetoric has been a most contested issue in recent scholarship. While at the middle of the 20th century Edwin Black could write that 'the only uniformity [...] is that Plato disapproved of rhetoric',²⁴ and had to mention a few exceptions only, such uniformity cannot be found in the literature devoted to the question in the five decades that followed.²⁵

One question that seems particularly puzzling for those dealing with Plato and rhetoric is the apparent tension between what we find in the *Gorgias* and the *Phaedrus*. Most of the former dialogue is devoted to Socrates' criticism of rhetoric, whose final word is that such a pursuit is οὐδενὸς ἄξιος (527d 7). In the *Phaedrus*, however, Socrates develops his conception of 'true' rhetoric (τὴν τοῦ τῷ ὄντι ῥητορικοῦ τε καὶ πιθανοῦ τέχνην, 269c 9–d 1), after delivering two speeches himself. Those who tried to explain rather than to deny that tension, do so, in the words of Black, 'by maintaining either that Plato changed his mind or that Plato did not mean by "rhetoric" in the *Gorgias* what he meant by "rhetoric" in the *Phaedrus*.'²⁶ This second type of argument is mostly followed by scholars who think that Plato was consistently hostile to rhetoric (in the sense of the *Gorgias*) and that his vision of 'true' rhetoric cannot be taken as a suggestion for reforming 'ordinary' rhetoric, but rather as an attempt to appropriate the name for something

²⁴ Black (1958/1979) 171.

²⁵ Although Yunis (2011) 10 still refers to it as 'the common view'.

²⁶ Black (1958/1979) 173. One of the best-known examples of the view that Plato changed his mind between the *Gorgias* and the *Phaedrus*, may be Ryle (1966) 259–263, also quoted by Guthrie (1976) 119. Cf. also Yunis (2009).

completely different.²⁷ The third way of interpreting the relevant Platonic texts, and the one followed by Black, works in the opposite direction, and tries to show the limits and qualifications of Plato's rejection of rhetoric in the *Gorgias*.²⁸ The interpretation of other texts of Plato is, in these cases, mostly determined by the authors' choice in terms of the *Gorgias/Phaedrus* problem.

There is one common feature of interpretations attributing a consistent positive or negative view of rhetoric to Plato: they are all based upon an assumption of coherence²⁹ and, consequently, they distinguish between different senses of 'rhetoric'. Advocates of the 'positive' view hold that 'rhetoric' as criticised by Socrates in the *Gorgias* is not rhetoric in general but its Gorgianic definition,³⁰ which seems to have been accepted by most of Socrates' contemporaries and may well stand for the Sophists' doctrines, or its contemporary practice. Opposed to that is 'true' rhetoric, mentioned cursorily in the *Gorgias* and discussed at length in the *Phaedrus*.³¹ The 'negative' view, in turn, takes Socrates' criticism at face value, and claims that references to 'true' rhetoric only serve the aim of showing why those interested in philosophy cannot endorse 'ordinary' rhetoric. 'True rhetoric', on this interpretation, is nothing else but philosophy.³² It seems, then, that the main difference is not so much in the interpretation of single passages (though there is much disagreement in that as well), but in what the interpreters think 'rhetoric' is.

In this chapter, I shall seek to reconstruct Plato's criticism of contemporary

²⁷ See e.g. Schakel (1966), Guthrie (1976), Calvo (1992), McCabe (1994), Rapp (2002) vol. 2, 218–223, and McAdon (2004a).

²⁸ A more recent example of this approach is Stauffer (2006).

²⁹ See e.g. Black (1958/1979) 171–172.

³⁰ See e.g. Black (1958/1979) 178.

³¹ For the opposition of 'true' and 'sophistic' rhetoric, see the title of Erickson's (1979) collection and most recently Yunis (2011) 10. This view may be traced back to Olympiodorus (see e.g. *In Grg.* 1.13, 12.3, 14.13 Westerink), while the argument that Plato attacks flattery rather than rhetoric itself (even in its 'ordinary' form) was made by Aristides (*Or.* 2.446ff., esp. 454 Behr), cf. Ausland (2007) 160–161.

³² Cf. n. 35 below.

rhetoric (understood to include the practice of public speaking as well as the theory covering that practice) and see what he has to offer as a replacement for it. As my focus will be on judicial rhetoric, I am going to examine, in particular, what (if any) place is left for legal argumentation by the ‘ideal’ or ‘true’ rhetoric advocated by Socrates in the *Gorgias* and the *Phaedrus*, and whether the Magnesian constitution depicted in the *Laws* allows for this kind of rhetoric.

In much of what I shall say in this chapter I am going to concur with exponents of the ‘negative’ view, most notably with Guthrie who discussed with much acumen Plato’s appraisal of rhetoric in a short paper published in 1976.³³ I hope that by a thorough examination of the three dialogues, I shall be able to provide more firm grounds for that view. I also hope to distinguish between different usages of ‘rhetoric’ without tacitly assuming, as Black writes, ‘that our author was inconsistent, or, at the least, careless about his use of language.’³⁴ I think Plato’s partly tacit redefinition of ‘rhetoric’ in the *Phaedrus* is an example (not a unique one, to be sure³⁵) of his subtle manipulation of language, rather than a sign of inconsistency or carelessness.

1 The *Gorgias*

While the *Gorgias*³⁶ has traditionally, and rightly, been read as Plato’s first elaborate statement concerning rhetoric, it would be difficult to argue that the

³³ Guthrie was also the only one who presented at least a selection of the evidence, without limiting his discussion to the *Phaedrus* (as did Schakel and McAdon).

³⁴ Black (1958/1979) 174.

³⁵ Cf. Guthrie (1976) 120, who writes that ‘what Plato calls the “true” representative of every human art, science or practice turns into the philosopher and bears little resemblance to his counterpart in everyday life, be he called statesman, scientist, lover, poet or rhetorician.’ Similarly McCabe (1994) 134, note 13.

³⁶ Quotations from the *Gorgias* in English follow the text of Irwin’s (1979) translation, with occasional modifications.

dialogue is simply about rhetoric. As the following overview of the argument (1.1) shows, the unity of the dialogue is brought about by the concept of justice,³⁷ which is part of the definition of rhetoric proposed by Gorgias in the first part of the dialogue and re-defined several times during the conversation. After the brief summary, this chapter discusses two problems concerning the relationship of rhetoric and justice in the *Gorgias*. The first one is related to the definition of rhetoric, the second one to its value. I am going to look first at Gorgias' definition (1.2) and Socrates' classification of rhetoric (1.3), trying to identify the role played in these by the concept of justice. Then I turn to the arguments put forth by Gorgias, Polus and Callicles (1.4) on the one hand, and Socrates (1.5) on the other. I shall argue that while both he and his interlocutors regard the forensic use of rhetoric as part of, or indeed subordinate to, political oratory, Socrates seems to pay more attention to the forensic use of rhetoric, even though this attention is paired with a more severe condemnation than for other instances of public speaking. I shall conclude (1.6) by looking at the consequences of Socrates' approach for judicial rhetoric.

1.1 The Argument of the *Gorgias*

Socrates develops his views about rhetoric progressively, through a debate with a series of three interlocutors: Gorgias himself, Polus, and Callicles.³⁸ Having agreed

³⁷ Even though several other problems are addressed throughout the conversation. See Olymp. in *Grg.* pr. 4 Westerink, who claims that those arguing that the dialogue is about justice and injustice ἀπὸ μέρους τὸν σκοπὸν ἐκλαμβάνουσιν, ἐκ τῶν πρὸς τὸν Πῶλον λόγων. Similarly *Prolegomena in Platonis philosophiam* 22 Hermann. See Jackson, Lykos and Tarrant (1998) 57, note 15. Olympiodorus (ibid.) describes the subject matter of the dialogue as περὶ τῶν ἀρχῶν τῶν ἠθικῶν διαλεχθῆναι τῶν φερουσῶν ἡμᾶς ἐπὶ τὴν πολιτικὴν εὐδαιμονίαν. Yet as Dodds (1959) 2 states in the introduction to his commentary, '[t]he two themes of ῥητορικὴ and εὐδαιμονία are, in fact, interlaced throughout the dialogue, somewhat as the themes of ῥητορικὴ and ἔρως are interlaced in the *Phaedrus*, but more logically and more skilfully.'

³⁸ This is not to say that Gorgias, Polus, and Callicles represent the same views in every respect: see Méron (1979) 64–72.

with Gorgias that they are going to have a dialectic exchange rather than listen to an epideictic speech (thus practically bracketing rhetoric as a method of inquiry already at the beginning), Socrates has Chaerephon ask the question ‘Who is Gorgias’ (Ὅστις ἐστίν, 447d 1). After Polus, Gorgias’ disciple,³⁹ has proven to be unable to answer the question according to the rules of dialectic (as opposed to rhetoric), Gorgias takes on the role of answering himself. Asked by Socrates about the scope of his *technē*,⁴⁰ he finally says that ‘it is the power to persuade by speech judges in the law-court, council-men in the Council Chamber, assembly-men in the assembly, and in every other gathering, whatever political gathering (πολιτικὸς σύλλογος) there may be’ (452e 1–4).⁴¹ To the question as to what this kind of persuasion is about, he further answers that ‘it is the craft of persuasion in law-courts, and in other mobs (ἐν τοῖς ἄλλοις ὄχλοις) [...] and about the things which are just and unjust (περὶ τούτων ἃ ἐστὶ δίκαιά τε καὶ ἄδικα)’ (454b 5–7). In the subsequent discussion Socrates demonstrates, step by step, that this kind of persuasion, which is supposed to be the aim of rhetoric, does not lead to (necessarily true) knowledge (ἐπιστήμη), but only to belief (πίστις) which is, in contrast, not necessarily true: ‘Then it seems rhetoric is the craftsman of persuasion which yields conviction (πειθοῦς δημιουργός ἐστιν πιστευτικῆς) but does not teach (ἀλλ’ οὐ διδασκαλικῆς) about the just and the unjust’ (454e 9–455a

³⁹ On his rhetorical activity see Socrates’ remark (462b 11) that he has read a σύγγραμμα in which Polus claims he has made an art (τέχνη) of rhetorical skill (ἐμπειρία, 462c 3). Whether Aristotle’s reference (*Met.* 981a 4) and other testimonia are based on the knowledge of a writing by Polus or merely echoes of the Platonic passage is unclear, see Rademacher (1951) 113 *ad* B XIV 5, and Dodds (1959) 192 *ad* 448c 4–9.

⁴⁰ On Plato’s use of *technē*, see Roochnik (1996) and Balansard (2001). Both scholars show that Plato does not really have a genuine rhetorical (or political) *technē* in mind: Socrates’ insisting on the issue only serves to emphasise his negative view of rhetoric by showing what it is *not*.

⁴¹ The classification of courts as ‘political gatherings’ may also be understood as reflecting that the Greeks saw no difference between ‘judicial’ and ‘deliberative’ rhetorical situations. Socrates, as we shall see, classifies rhetoric as πολιτικῆς μορίου εἶδωλον (463d 2), cf. Matthes (1958) 124, note 1, quoting Throm (1932). Hellenistic rhetorical theory, too, described the subject matter of rhetoric as *politika zētēmata*. Cf. Heath (2004) 33 with note 47, and the discussion of Matthes (1958) 123–124.

2).

As for the object of rhetoric repeatedly emphasised by Socrates, the question of just and unjust, Gorgias claims that even if his pupils are not aware of what is just and unjust, he can teach them that (460a 3–4). As a consequence, Socrates makes him accept the proposition that the intention of a citizen who is acquainted with rhetoric cannot be directed at unjust things (460c 4–6), which, however, contradicts Gorgias’ earlier statement (456c 7–457c 3) that teachers bear no responsibility for the unjust deeds of their pupils.⁴²

Polus, the next interlocutor, rejects a previous claim of Gorgias, which he thinks his master accepted ‘in a weak moment’, according to which the rhetorician knows what is just and what is not (461b 4–c 3). The problem of justice is left to one side for a while, as Polus, who takes over the role of the interrogator, asks Socrates what he thinks rhetoric is. In this part of the conversation, Socrates argues that rhetoric is not a *technē*, but a skill (ἐμπειρία, 462b 8–c 3), or, in more negative terms, ‘the shadow of a part of the political art’ (463d 2)⁴³ and as such it cannot be of any value.

Polus is apparently unable to understand the distinction between knowledge and opinion, which is at the basis of Socrates’ severe censure, nor can he refute the claim that intention can only be directed to what is (genuine) good. As an objection, he mentions the example of Archelaus of Macedon, who, having committed many grave injustices, still lived in happiness (470d 1–6, 471a 4–c 6). In his response to that, Socrates demonstrates that doing something unjust is not only more shameful but also worse than suffering injustice (472e 4–475e 6). Moreover,

⁴² Some scholars argue that Gorgias is not refuted by this outcome, see e.g. Notomi (2007). However, he does not challenge Polus’ acceptance of his being refuted, nor does he suggest a distinction between different senses of ‘justice’, which would, as Notomi argues, save his argument.

⁴³ I.e. of justice. On Socrates’ analogy see section 1.3 below. The way the analogy works is discussed by Mesch (2007).

according to him it is the worst thing possible to commit injustice (479c 8–d 1).

The next adversary, Callicles,⁴⁴ says he cannot accept the claim approved by Polus, according to which it is more shameful to commit than to suffer injustice (482d 7–8). He tries to argue for the natural right of those in power to satisfy their desires without having to respect justice (483c 8–d 2). Socrates answers by pointing out that what is good is not the same as what seems pleasant (495d 2–e 2, 497a 3–5), and therefore one's intention (and consequently knowledge as well as persuasion) has to be directed at the former rather than the latter (501b 1–c 5, 503a 5–9, 504d 1–e 3).

Callicles repeatedly criticises Socrates for the uselessness of his concept of knowledge and persuasion that derives from it. This kind of persuasion, he argues, cannot protect one against e.g. false accusations which, if accepted by the court, can even lead to one's death (486a 4–c 8). Socrates admits this, but points out the incompetence of those who are empowered to decide in such matters. According to his analogy, he is as powerless in front of the court as the physician who is prosecuted by a cook (representing flattery to the body, cf. 464d 3–e 2) in a court of children (521e–522c 3). His only consolation may be if he can avoid committing injustice, even at the cost of having to suffer it from other people (522c 8–e 1).

As a conclusion to the dialogue, Socrates tells a myth about the final judgement on human deeds (523a 1–524a 7). In the beginning, judgement about people's life was passed just before their death by judges selected from their fellow humans. This practice, however, led to judgements which the gods found unjust. Disappointed with the incompetence of living human judges, Zeus gave the power to judge to the dead, who pass their judgement after the death of those whose lives

⁴⁴ On the figure of Callicles see Dodds (1959) 12–15, with references to earlier literature.

have to be judged. It is only this way that judges can be saved from falling victim to appearances when passing judgement.

Socrates summarises the conclusions of the conversation as follows: (1) ‘we must avoid doing injustice rather than suffering it’; (2) ‘above all a man must practise not seeming good but being good in private and public life’; (3) ‘if someone becomes evil in some way, he is to be punished [...]’; (4) ‘[a]ll flattery, to ourselves or to others, few or many, we must shun’; (5) ‘this is how we should use rhetoric – always in the direction of justice (ἐπὶ τὸ δίκαιον) – and every other activity’ (527b 4–c 4). As a consequence, the right kind of persuasion has to be based on knowledge of the good. This knowledge, however, is according to Socrates rather something to aim at than a state already achieved by anyone. He therefore recommends practising justice and other virtues to his interlocutors, as opposed to the practice or theory of rhetoric: ‘let us follow [...] not that account you believe when you call me to follow it; for it is worth nothing, Callicles’ (527e 5–7).

1.2 Gorgias’ Definition

The concept of justice serves different, but closely related, aims in the argument. It helps Socrates to question the knowledge offered by rhetor(ician)s⁴⁵ to their pupils; to inquire about the moral foundations of politics; and finally to distance himself from the public life of contemporary Athens. It is also justice that provides a common perspective when discussing two different aspects of practising rhetoric: that of seizing power through manipulating political decisions by speaking to the public, and that of defending oneself in court when charged with crimes. While I

⁴⁵ The Greek word ῥήτωρ does not allow for making a difference between ‘teacher of rhetoric’ and ‘orator’. See Irwin (1979) 113 *ad* 449a and 137 *ad* 466a and Cole (1991) 14–15. Cf. also Walker (2011) 1–2, in terms of modern usage.

shall try to distinguish between these aspects when discussing the differences between Socrates' approach and that of his interlocutors, it has to be noted that they might not seem different to Plato or his contemporary readers, and are apparently not separated by the speakers of the dialogue.

Nor do Plato and the characters of the dialogue distinguish systematically between branches of rhetoric. It seems, however, that earlier rhetorical theory did make such a distinction, and while for Plato's 'scientific' approach there is no difference between instances of using rhetoric, he has to formulate this idea in contrast to the generally accepted view.⁴⁶ On the other hand, it also seems that rhetorical theory, before Aristotle at least, took judicial oratory as the paradigmatic case of public speaking.⁴⁷

Thus, we have Gorgias, Polus and Callicles, representing 'traditional' rhetoric but not focusing on judicial oratory on the one hand, and Socrates, challenging that kind of rhetoric but at the same time showing more interest for what is at stake in forensic speeches. This raises the question of whether the Socratic challenge to Gorgias' rhetoric manifests itself in Socrates' discussion of forensic situations.

As mentioned above, the definition of rhetoric accepted by Gorgias gives Socrates the opportunity to express his doubts concerning the soundness of rhetorical knowledge on the one hand, and to shame Gorgias into contradicting himself on the other. Yet it seems worthwhile to have a closer look at Gorgias' definitions as they are, leaving their merits and shortcomings aside for the moment.

The first thing to note is that in the first case, Gorgias emphasises that

⁴⁶ See Hellwig (1973) 113. Cf. *Soph.* 222c 9–d 1: Τὴν δὲ γε δικανικὴν καὶ δημηγορικὴν καὶ προσομιλητικὴν, ἐν αὐτῷ τὸ σύνολον, πιθανουργικὴν τινα μίαν τέχνην προσειπόντες.

⁴⁷ See Eden (1986) 9–10, and Hellwig (1973) 113.

rhetoric can be employed in every kind of political gathering. He remains consistent on this point, as he keeps on adding to the law-courts that ‘and in other mobs’.⁴⁸ On one occasion he also remarks that the orator may be persuasive ‘as long as it is a mob’ which he addresses (459a 3).⁴⁹ This definition of rhetoric sounds very much like the one Phaedrus advocates in the *Phaedrus* (whereas there Socrates wants to understand rhetoric as the *technē* dealing with all kinds of *logos*).⁵⁰

This latter is generally recognised as the ‘traditional’ or ‘standard’ definition of rhetoric, most probably the one the historical Gorgias, among others, taught to his pupils.⁵¹ It takes forensic oratory as its model, but it claims that the doctrines of rhetoric are relevant for any kind of public speaking.

What Gorgias adds to the definition is the element of justice. The fact that including justice in the definition eventually leads to Gorgias’ being refuted, and that the definition given in the *Phaedrus* does not contain any reference to justice or any other subject matter of rhetoric makes it appealing to think of this passage as an instance of Plato’s creative reconstruction of other people’s doctrines.⁵² While such a view may be right in supposing that Gorgias did not limit the scope of rhetoric to problems of justice, I think the definition is not a clear misrepresentation of his doctrines. What seems the most probable explanation is that Gorgias did not include the possible subjects of rhetoric in his definition (if he

⁴⁸ Socrates echoes the expression ἐν δικαστηρίοις τε καὶ τοῖς ἄλλοις ὄχλοις περὶ τῶν δικαίων τε καὶ ἀδίκων at 454e 5–7, cf. 455a 3–4. See also the next note.

⁴⁹ The size of the audience is problematised by Socrates at 455a 5–6, where he seems to suggest that a great number of people is even less likely to be ‘taught’ by a speech than just one person. Gorgias repeatedly emphasises that the power of rhetoric shows itself best when speaking to masses (see also 456c 6, 457a 6). Following the above remark of Gorgias, Socrates interprets ἐν ὄχλῳ as ἐν τοῖς μὴ εἰδόσιν (459a 3–4), and keeps on using the latter expression throughout their exchange. On the negative connotations of ὄχλος see Dodds (1959) 205 *ad* 454b 6.

⁵⁰ See sect. 2.2 below.

⁵¹ See Dodds (1959) 202 *ad* 452e 1–8.

⁵² This is the way Kennedy reads the *Gorgias*, arguing that such a limitation of the possible subjects of rhetoric is ‘a tactical mistake and not likely to have been the view of the historical Gorgias, who surely believed that his art applied to any topic’: Kennedy (1994) 36.

had any) and Plato added the reference to justice on the basis of the original definition which also appears in the *Phaedrus*. Plato may, however, well have thought he was justified in doing so, and we do not know of any objection from his contemporaries either.⁵³ Since Gorgias puts forensic oratory in the first place both in his definition and elsewhere, making explicit the preoccupation of rhetoric with matters of justice may not be that inaccurate.

On the other hand, δίκαιά τε καὶ ἄδικα may be less strict a limitation than it would seem in the light of the threefold division of rhetoric.⁵⁴ In the eyes of Plato, justice is but one aspect of virtue, and he has Socrates argue against Polus and Callicles that there is no real difference between *dikaion*, *kalon* and *agathon*. This also means that if Gorgias named any other value or set of values,⁵⁵ it would not help him at all, for Socrates could still make the same argument from identifying *knowing* virtue with *being* virtuous. Moreover, Gorgias cannot state that persuasion in concrete cases is not about something in particular, independent of particular values. Finally, as the dialogue shows, the speakers do not limit the scope of justice to matters argued about in forensic speeches, as they also discuss the problem of political power in terms of justice. Even Polus, who claims that being unjust is not an evil in itself, does not say that justice would be irrelevant for their discussion.

1.3 Socrates' Analogies

The close relationship of judicial and deliberative rhetoric is also highlighted by Socrates' answers to Polus' series of questions (often solicited, at certain points even formulated, by Socrates himself) concerning the status of rhetoric. While the

⁵³ In the case of *teaching* justice to those not acquainted with it, *Meno* 95c 1 may be read as a later correction to 459c 6–460a 4. See also Athenaeus 11.113.1–12 Kaibel, but cf. Dodds (1959) 216 *ad loc.*

⁵⁴ Cf. Thompson (1871) 18 *ad* 454b.

⁵⁵ As Kennedy seems to suggest, see n. 52 above.

question ‘What is rhetoric?’ seems to depart from the topic of justice, an analogy developed by Socrates brings the conversation back to it.

The analogy, in its first form, is between rhetoric and cookery (ὄψοποιία, see 462d 8–e2). As neither of these is a *technē* but some kind of ἐμπειρία aimed at producing enjoyment (χάριτος καὶ ἡδονῆς), they are part of the same pursuit (αὐτῆς μὲν ἐπιτηδεύσεως μόριον, 462e 3–4). As a next step (463a 6–b 6), Socrates identifies flattery (κολακεία) as the main concept⁵⁶ to which rhetoric and cookery are subordinate, along with cosmetics (κομμωτική) and sophistry (σοφιστική). Another statement on rhetoric, according to which it is πολιτικῆς μορίου εἶδωλον. (463d 2), suggests that the real *technē* imitated by flattery is politics, which is then made explicit at 464b 3–4 with the qualification that politics only deals with the soul.

In a brief exchange with Gorgias (464a 1–b 1), Socrates makes clear the principles of his analogy, which is based on two pairs of opposites: body/soul and real/apparent goodness (εὐεξία). The complete analogy, explained in details at 464b 3–465c 5, may be summarised as follows:

body		soul	
real	apparent (κολακεία)	real	apparent (κολακεία)
[unnamed]		πολιτική	
– γυμναστική	– κομμωτική	– νομοθετική	– σοφιστική
– ιατρική	– ὄψοποιική	– δικαιοσύνη	– ῥητορική

Rhetoric, then, is the εἶδωλον of justice in the same way as cookery is of medicine (as Socrates puts it *more geometrico* at 465c 4–5), and the ἀντίστροφος of cookery as regards the soul (465d 8–e 1).⁵⁷ As for the close link between, and the

⁵⁶ His exercise can be regarded as an early instance of collection and division, described later in the *Phaedrus* (265d 3–266b 1) and employed throughout in late dialogues such as the *Sophist* and the *Statesman*.

⁵⁷ Dodds (1959) 227 *ad loc.* remarks that in this analogy Plato overlooks the difference between the *technai* focusing on the body of the individual and those concerned with the souls of the community. While his critique is certainly justified in so far as laws have a universal sphere of validity and speakers address (representatives of) the whole community, it is interesting to see how

consequent similarity of, rhetoric and sophistry, these are due to the fact that both of the two quasi-*technai* work in the same field (dealing with matters concerning the soul) and have the same objectives (producing appearances).⁵⁸ Small wonder that rhetoricians and sophists can hardly be distinguished by other people or even by themselves (465c 5–8).

While Socrates' analogies reflect a rather straightforward view as to the value of rhetoric, they are less explicit in terms of its possible scope. Let us have a look at this latter first.

Socrates is, and so he makes his audience, aware that sophists and rhetoricians are easily mistaken for one another, even if their pursuits 'differ by nature' (465c 5). This difference may be the same as that between νομοθετική and δικαιοσύνη, or, in terms of the body, γυμναστική and ἰατρική, but Socrates does not make it any clearer, nor do his interlocutors inquire about it. Still, one may think, with some speculation, of a difference between *technai* that focus on the overall good condition of the body – in the case of legislation, the body politic –, and those that aim at making good decisions in particular cases.⁵⁹ Understood this way, rhetoric is not limited to the forensic use of speech, but includes all situations where someone tries to influence the public in favour of a certain decision. Thus, while in Gorgias' definition the δίκαιά τε καὶ ἄδικα seems to reflect the prevalence of judicial rhetoric in contemporary theory, Socrates' inquiry is not confined to that branch.

Socrates relates justice to the individual. Cf. sect. 1.5 below.

⁵⁸ Just as their 'real' counterparts do, see 464c 1–3.

⁵⁹ This reading of Socrates' classification is somewhat more cautious than that of Olympiodorus, who speaks of protective and corrective arts (*in Grg.* 12.3 Westerink: τὸ μὲν νομοθετικὸν ὅμοιον τῇ γυμναστικῇ, φυλάττει γὰρ τοὺς καλῶς κεμένους νόμους, ὥσπερ ἐκείνη τὴν ὑγείαν· τὸ δὲ δικαστικὸν τῇ ἰατρικῇ, ἐπανορθοῦται γὰρ τὰ πλημμεληθέντα) and is followed by most modern interpreters, who sometimes distinguish between regulative and corrective arts: see e.g. Dodds (1959) 226 *ad loc.* Their view may find some support in *Soph.* 228e 2–229a 5, but there it is ἡ κολαστική [...] Δίκη (229a 4–5) that is the corrective of moral deficiencies.

As for the value of rhetoric, Socrates is quite explicit. He claims that ‘rhetoric is part of a pursuit that does not belong to the good things’ (463a 3–4) and that it is something shameful (αἰσχρόν, 463d 4). It is part of the κολακευτική, which ‘does not think of what is the best, catching ignorance with what is the most pleasant, in order to seem most honourable’ (464d 1–3). He goes into details about how cookery imitates, and indeed jeopardises, medicine, then highlights the parallel between cookery and rhetoric. This parallel is repeated at 465d 7–e 1, where he summarises his explanation: ‘you have now heard what I say rhetoric is: the equivalent of cookery for the soul (ἀντίστροφον ὁψοποιίας ἐν ψυχῇ)’.

It seems, then, that Socrates’ argument is based on the elements of Gorgias’ definition of rhetoric. He also shares Gorgias’ view concerning the importance of justice. The difference lies in his appraisal of rhetoric, and this is reflected by his counter-definition: rhetoric is not a *technē* but (part of) a quasi-*technē* that is based on appearances and, consequently, fraud.

Socrates’ remark that Gorgias was not quite clear about what he thinks rhetoric is (462e 8–463a 2) only means that Gorgias’ definition did not live up to Socrates’ criteria of definition:⁶⁰ no one of the interlocutors raises any objection as to Socrates’ understanding of Gorgias’ words. Socrates, in turn, does not leave any doubt that he describes what *he* thinks rhetoric is (463a 2–3), without any further qualification. This, then, hardly leaves any place for arguing, as some scholars have done, that Socrates’ challenge is confined to Gorgias’ conception of rhetoric.⁶¹ The difference between their definitions does not mean that they are speaking about

⁶⁰ And thus insinuates, once again, that Gorgias, *qua* rhetorician, does not know what rhetoric really is.

⁶¹ E.g. Black (1958/1979) 178.

different things: it only means that they classify the same thing differently.⁶² Let us now turn to the arguments concerning the power and usefulness of rhetoric, with special attention to the different ways followed by Gorgias, Polus and Callicles on the one hand, and Socrates on the other.

1.4 The Power of Public Speaking

The starting statements of Gorgias and Socrates show that the scope of rhetoric is broader than just forensic oratory. In fact, forensic situations play a less important role in the arguments of Gorgias, Polus and Callicles than politics. To begin with, Gorgias does not concentrate on judicial rhetoric, but rather – again in accordance with what we know of his teaching – on the manipulation of other people through the power of speech.⁶³ As Socrates asks questions about the role of knowledge in rhetoric, the examples they discuss revolve around medicine, the *technē par excellence*, and other crafts useful for the city as a whole, such as ship-building or strategy.

The next time we hear about forensic oratory from someone else than Socrates, it is alluded to indirectly by Polus, who tries to persuade Socrates that orators hold an immense power in the city: ‘Aren’t they like tyrants? Don’t they kill whoever they want to, and expropriate and expel from the cities whoever they think fit?’ (466b 11–c 2). Yet this question, like the whole discussion of Socrates and

⁶² Cf. Cornford (1935) 186: ‘The Division should be preceded by a Collection, to fix upon the genus we are to divide. This is done by “taking a comprehensive view and gathering a number of widely scattered terms into a unity” [*Phaedrus* 265d]. Here no methodical procedure is possible. The generic Form must be divined by an act of intuition, for which no rules can be given. The survey will include the Form we wish ultimately to define, with others that may be “widely scattered” and have little superficial resemblance to it or to one another.’ This is what happens here: Socrates’ starting point is the claim that rhetoric is not a *technē*, as Gorgias claims, and that it should be defined as an instance of flattery.

⁶³ As a parallel, one may think of the argument of his *Praise of Helen* (DK 76 B 11), which is now generally regarded as authentic, the scepticism of Thompson (1871) 177–178 notwithstanding.

Polus, focuses on the problem of power and the influence of the orators, whereas the question as to the exact means of using their power – presumably but not certainly the courts in the case of killing or expropriating someone – looks less relevant from this point of view.

The example mentioned by Polus is taken up later by Callicles, who gives it a personal thrust:

Suppose someone arrested you, or some other philosopher, and threw you into gaol, claiming you were doing injustice when you were doing none; you know you'd have no idea what to do with yourself; you'd be dizzy, you'd gape, not knowing what to say; you'd go into court, to face some inferior wretch of an accuser, and you'd be put to death if he wanted the death penalty for you. (486a 6–b 4)

Apart from the obvious allusion to Socrates' trial,⁶⁴ however, Callicles' argument is pointed at the opposition of devoting one's life entirely to philosophising and participating in public life. His list of what a proper citizen should (and the contemplating philosopher cannot) be acquainted with includes the laws of the city, the way one should speak 'in private and public transactions', 'human pleasures and desires', and, summing up the whole, 'the ways of men' (484d 1–7). Here again, having to defend oneself in court appears as part of the dangers of public life. Later, when Callicles gives examples of 'good rhetors', he mentions Themistocles, Cimon, Miltiades, and Pericles (503c 1–2), who allegedly served the common interest of the city – apparently by giving advice to the Assembly rather than speaking before the court.

It is in Socrates' discussion with Callicles that some think to find references to the Platonic 'true rhetoric' developed later in the *Phaedrus*. Starting, again, from the opposition of genuine and false *technai* (500e 4–501c 5), then drawing a parallel between poetic performances and rhetoric (501d 4–502d 4), Socrates asks whether

⁶⁴ On the possible Aristotelian echo of the passage in the *Rhetoric* (1355a 38–b 2), see Grimaldi (1980) 30 *ad* 455b 2 and Schütrumpf (1994) 112–113, with note 77.

political oratory in Athens differs from poetic *logoi* in that ‘rhetors always speak with an eye on what is best, and aim to make the citizens as good as possible by their speeches’ (502e 2–5) or not. To Callicles’ answer that there are orators of both kind, Socrates responds:

That’s all right. For if there are really two types here, I presume one type is flattery, and shameful public oratory, while the other is fine – trying to make the souls of the citizens as good as possible and working hard in saying what is best, whether it is pleasant or unpleasant to the audience. But you’ve never yet seen this kind of rhetoric; or if you can mention a rhetor of this type, why haven’t you told me as well who he is? (503a 5–b 3)

Socrates’ criteria of the good orator are quite simple: he has to make his audience (here the political community of the Athenians) better. Not only contemporary politicians, but also those from the previous generations fail the test. The question, then, is whether this was necessary or merely contingent. Is good rhetoric possible at all?

Socrates, to be sure, never puts this question in an explicit form, nor does he give an explicit answer. What we have is his hypothetical statement that *if* there is good rhetoric, i.e. a real *technē* of rhetoric, then it has to serve a positive aim, similarly to other *technai*. He is quick to add that he has never seen any example of that. As for his positive suggestions, these follow the lines of the *technē* argument: if one is to be a *technitēs* of justice (cf. 504d 5–6: ὁ ῥήτωρ ἐκεῖνος, ὁ τεχνικός τε καὶ ἀγαθός), then one has to gain expertise in the field. This can be achieved by living virtuously, following the precept of Socrates, according to which it is worse to commit than to suffer injustice. Here, however, the focus is shifted, once again, from political matters to the actions of the individual. This corresponds to Socrates’ understanding of the *technē politikē*, of which he claims to be the only exponent in Athens (521d 6–8), and which he summarises as follows:

[T]he man who wants to be happy must pursue and practise temperance (σωφροσύνην), and flee intemperance (ἀκολασίαν) as fast as each of us can run. He must manage, best of all, to have no need of chastisement (κολάζεσθαι); but if he or any of his own, an individual or a city, does need it, punishment and chastisement must be imposed (ἐπιθετέον δίκην καὶ

κολαστέον), if he is to be happy. (507c 9–d 6)

Chastisement (κολάζεσθαι) can take two forms: in the case of an individual, it means punishment, while in the case of a community it works through an edifying address to the assembly. Rhetoric is the εἰδωλον of justice in the sense that it should aim at what is good in both cases⁶⁵ but fails to do so, for it seeks to gratify the audience by no matter what means. It is interesting to see that Socrates consistently speaks of κολάζεσθαι in individual terms, which suggests that there is no essential difference between educating an individual and a whole city. This may be one reason why he repeatedly evokes courtroom scenes to illustrate his views. To these scenes we shall now turn.

1.5 Justice and Judgement

While Socrates never says that public matters would be irrelevant for their current discussion, and indeed directs the conversation in a way that touches on problems related to speaking before the Assembly or the Council, he still seems to pay much more attention to situations covered by judicial rhetoric than his interlocutors do. In the case of both Polus and Callicles, he finishes his dialectical arguments by longer speeches, which are pointed, albeit from different angles, at forensic oratory.

Having proven to Polus that ‘doing injustice is second in greatness among evils; doing injustice and not being punished is really the greatest of all and first of evils’ (479d 4–6), Socrates returns to the problem of rhetoric, to draw a conclusion as to the proper function of this alleged *technē*. Given that avoiding punishment for one’s unjust deeds is not good, he argues, this cannot be the aim of oratory, if one is to exert it in one’s own interest. The only purpose that can be properly served by

⁶⁵ See 480d 3–6 and 508b 8–c 2 on what Socrates thinks would be the proper function of judicial rhetoric.

rhetoric is quite the opposite: one ‘should himself be the first denouncer of himself and of the rest of his relatives, and use his rhetoric for this, to have his unjust actions exposed and get rid of the greatest evil, injustice’ (480d 3–6).

While Polus finds these conclusions absurd, he has to admit that they are in accordance with what they have agreed upon so far. Socrates then adds that ‘if our enemy treats someone else unjustly, we should take every precaution, in speaking and in action, to prevent him from paying justice and appearing before the judge’ (480e 7–481a 2).

As for the first case, most commentators of the dialogue share Polus’ opinion: while the argument of Socrates is coherent, it seems absurd that he encourages denouncing one’s relatives. Moreover, it is usually taken to contradict what he says in the *Crito*, the *Euthyphro*, or the *Seventh Letter*.⁶⁶ On the one hand, his suggestion is, as Dodds puts it, ‘a comic inversion of vulgar utilitarianism’.⁶⁷ It clearly serves the aim of showing Polus and the others that their ‘*technē*’ cannot help them to achieve the purposes they attribute to it. On the other hand, however, if we take Socrates’ suggestion at face value, we have to consider the feasibility of using rhetoric to bring injustice ‘into the open’.

If someone is to denounce himself, then there is clearly no need for rhetoric. If one tells the court about the injustices he committed himself, no debate is likely to arise, as a clear and true account of the facts can persuade the judges about one’s being guilty without the help of rhetorical devices. Things may not be so simple

⁶⁶ See Dodds (1959) 258. However, neither of these passages seems to furnish compelling evidence. At *Euthyphr.* 4e 4–8, Socrates mockingly asks Euthyphro whether he is sure he knows better than his relatives who consider it to be impious to sue one’s father. At *Cri.* 50e 7–51a 2, Socrates has the laws say that children and servants cannot return whatever they suffer from their fathers or masters. *Ep.* 7, 331c 1–6 says that it is impious to use compulsion (προσβιάζεσθαι) on one’s parents if they live a life one does not like. Cf. also *Lg.* 730d 2–7, where the Athenian praises the citizen ‘who reveals the wickedness of another to the authorities’ in general, without mentioning any exception.

⁶⁷ Dodds (1959) 257.

when denouncing one's friends or relatives. Yet also in such a situation, if it is the truth that has to be proven, there is no place for flattery or other sort of 'gratification' of the audience. For if the audience cannot be persuaded by way of merely 'bringing into the open' the facts of the case, without making use of rhetorical devices proper, i.e. those aiming at conviction rather than knowledge, then the orator has to choose between departing from the truth (this would be the case with *eikos* arguments criticised by Socrates in the *Phaedrus*) and failing to persuade.

Departing from the truth also lies at the heart of the second case, when trying to get one's enemy acquitted. Here, rhetoric can achieve 'justice' by lying: the orator has to convince the judges that the defendant should not be punished, thus making that latter suffer from the burden of his own injustice to a much greater extent than in the case of receiving punishment. This situation, however, contradicts Socrates' own conception of justice. He expresses his disapproval of the traditional principle of 'doing good to one's friends and harming one's enemies' on several occasions, and he also indicates his reservation here, by adding 'if we really should harm anyone – an enemy or anyone at all' (480e 5–6).

At the end of Socrates' exchange with Callicles, the conversation returns to courtroom situations in two contrasting depictions of judicial activity. The first account is provoked by Callicles' warning, which tries to make Socrates aware of the perils of trying to make the Athenians better rather than serving them. Repeating what he said earlier about the possibility of Socrates' being taken to court, this time he emphasises the moral content rather than the technique of rhetoric. It is not enough, he argues, not to commit injustice if one is to avoid false accusations. In his reply, Socrates makes use, once again, of the opposition between medicine (a real *technē*) and cookery (an instance of flattery). He compares himself

to a doctor who has to stand trial before a court with children as his judges, and a cook as the plaintiff. Since the views of the defendant and the judges as to what is harmful or beneficial differ, the former will 'be able to say neither what's true [...] nor anything else' (522b 9–c 2) and therefore he cannot prevent the most severe punishment being inflicted on him. Still, Socrates is happy with this scenario, for as he argues, 'the supreme form of self-defence' is not 'flattering rhetoric' but 'saying and doing nothing unjust towards men or gods' (522c 8–e 1). What matters is not the decision of the Athenian court but that of the judges in Hades, who decide on the fate of the dead once these arrive before them.

This second kind of judgement is the subject of Socrates' next account (*logos*, as opposed to *mythos*⁶⁸) which is about a judicial reform carried out by Zeus: 'In the time of Cronus, and early in Zeus' reign, these men [i.e. those about to die] were judged while they were still living, by judges still living, judging them on the day they were to die; and so the cases were being judged badly' (523b 4–7). Of course, the gods are interested in sending each person to his or her proper place in the other world, to the Isles of the Blessed or the Tartarus, respectively. Consequently, Zeus decided to remove everything that could possibly distort the judgement: the possibility of the defendants to bring witnesses, and the factors that mislead the senses of the judges, i.e. both the defendants' and their own bodies. Thus, humans cannot know the time of their death,⁶⁹ and they are judged when already dead, by judges selected from among the dead: Aeacus, Minos, and Rhadamanthys.

In his explanatory remarks to the myth, Socrates draws a parallel between

⁶⁸ See Dodds (1959) 376–377 *ad* 523a 2. The use of myth is interpreted, quite convincingly, as an example of Socrates' 'true rhetoric' by Rechenauer (2002), esp. 239–240.

⁶⁹ According to Dodds (1959) 378 *ad* 523d 7–e 1, Zeus' intention may have been 'to discourage death-bed repentances'. The context, however, suggests that Plato links the knowledge of one's death to the possibility of bringing witnesses.

the body and the soul:

The body keeps its nature, the ways it has been cared for, what has happened to it – all clear to see. [...] I think the same is true about the soul as well, Callicles. Everything is clear in the soul when it is stripped of the body, what belongs by nature and what has happened to it, all that the man acquired in his soul from each of his practices. (524b 6–d 7)

As a consequence, the judge of the dead has only to look at the ‘naked’ soul: he examines (θεᾶται) them, notices (κατεῖδεν) and sees (εἶδεν) the marks of injustice, and gives his verdict accordingly (524e 2–525a 7).

These two accounts can be understood as indicating the role of rhetoric in a human (contemporary Athenian) and in a divine context, respectively. In the first case, the ‘judges’ do not know the difference between good and bad, and consequently they cannot decide on the basis of truth in matters of justice and injustice. They only consider what is pleasing for them to see and hear. In such a situation, the orator trying to tell the truth and to improve the audience is necessarily doomed to fail. The thought experiment of the *Gorgias* and the experience of Socrates’ trial show that ‘true rhetoric’ in the *polis* is more than useless: it is counterproductive. What remains for the orator who aims at persuasion is nothing else but flattery, which Socrates finds unacceptable for moral reasons.

In the case of the Judgement of Souls, in turn, there is simply no place for ‘ordinary’ rhetoric. What Minos and his fellow judges are interested in is nothing else but the truth about one’s just and unjust deeds. Yet there is no place here for ‘true’ rhetoric, either. As the truth is directly accessible for the judges, being displayed on the souls of the deceased, no communication by way of words or otherwise is necessary.⁷⁰ The judges see everything that is relevant, so they do not

⁷⁰ Cf. Goldschmidt (1949) 78, quoted by Dodds (1959) 379 *ad* 524a 8–525a 7, with further references to ancient authors. The unequivocal nature of the truth shown by the naked bodies makes them instrumental, in the case of incorrigible characters, as warning and deterring signals (525c 1–9), cf. Rechenauer (2002) 239.

need to hear anything.⁷¹

1.6 Conclusion

Before proceeding to the *Phaedrus*, it now seems in order to summarise the findings of the above investigations, as regards (1) the definition of rhetoric, (2) the relationship between its different uses, and (3) Socrates' appraisal of judicial oratory.

(1) The first definition of rhetoric given by Gorgias seems to be the one widely shared by contemporary rhetoricians. It includes the aim of rhetoric, persuasion, and the venues of oratory, political gatherings. Among these venues, law-courts hold the first place, which corresponds to Gorgias' way of speaking throughout the discussion (as well as Phaedrus' assertion in the *Phaedrus*).

The second definition, in which Gorgias adds to the former the subject of persuasion, things just and unjust, seems to derive from the first one in the sense that such an identification of the possible subjects of rhetoric is justified by the primacy of judicial oratory in traditional rhetorical doctrine. While this may seem an excessive limitation of the scope of rhetoric, the speakers of the dialogue do not perceive it as such, nor does it contribute to the power of Socrates' argument against Gorgias.

(2) While the definitions of rhetoric reflect what may be regarded as the *communis opinio* of contemporary doctrine, the speakers of the dialogue do not distinguish between branches of rhetoric, but discuss the problem of justice in

⁷¹ Therefore, while Rechenauer (2002) 248 is certainly right in that sophistic *epideixis* (focusing on political and social status) is shown here to be irrelevant for the final judgement, and it is also true that Socrates' telling of the myth functions as a 'new model of rhetorical *epideixis*', it has to be emphasised that it is a new model of philosophical teaching (thus anticipating the 'true rhetoric' of the *Phaedrus*), not of rhetoric *stricto sensu*. It is not about improving or amending the methods of judicial rhetoric, but showing its irrelevance for what really matters in (and after) life.

terms of both judicial and deliberative situations. Thus, they implicitly challenge part of the rhetorical tradition. However, they do so in different ways.

Polus and Callicles, who take side with Gorgias in the debate, do not reject the definition of rhetoric based on the primacy of judicial oratory. Yet the focus of their arguments is on the use of rhetoric for the sake of gaining power and achieving individual political aims. Callicles only mentions the law-courts to make Socrates aware of the dangers of not being an expert orator. Judicial oratory thus appears as an auxiliary to deliberative speaking. It provides a means of defending oneself and possibly getting rid of one's enemies, while it is by advising the community that one can influence the orientation of the *polis*' major political affairs.

Socrates, in turn, speaks much more about forensic situations than his interlocutors. This is not to say that he neglects the deliberative genre, but he closes his conversation with both Polus and Callicles by examining the use of rhetoric before law-courts, and it is from these examinations that he draws his final conclusions as to the value and possible function of rhetoric. His emphasis on judgement and punishment draws attention to the fundamental difference between his approach and that of Gorgias, Polus and Callicles. While the latter seek success by way of persuasion in public life and wish to go unpunished if brought before a law-court (albeit for different reasons), Socrates' primary concern is the just or unjust behaviour of the individual, which is, or at least should be, the subject of judicial decision.

(3) Claiming to be the only person in contemporary Athens who engages in the real *technē politikē*, Socrates claims that the proper aim of politics is the moral improvement of citizens, which he tries to achieve by way of face-to-face conversation. His political purpose *par excellence* cannot be served by the usual

means of ordinary rhetoric, i.e. persuading mass audiences. Nor does he think that rhetoric could contribute to the judges' making of just decisions.

While it may be argued that Socrates may not want to dispose of public speaking altogether (even though speaking to an *ochlos* of 'those who do not know' is for him everything but desirable),⁷² it seems certain that his ideal of judicial decision simply does not leave any place for rhetoric. In a *polis* where people live following his precepts, public deliberation of some sort may still exist. In the law-courts, however, the decision has to be determined by the facts on the one hand and the character of the perpetrator on the other, this latter being understood as the sum of just and unjust deeds he committed in the past.

Yet reality seems to be closer to the situation described by Callicles. As the example of the cook and the physician shows, the separation of political interests and judicial decision-making is, in Socrates' view, not achieved in Athens. His scepticism about the politicians' ability to improve the moral standards of the citizens suggests that such a separation is hardly possible, at least under a democratic regime. As things stand, it is only the judges of the dead who can make a verdict based exclusively on the deeds of the defendant, apart from any other consideration.

2 The *Phaedrus*

Even more than the *Gorgias*, the *Phaedrus*⁷³ is traditionally regarded as a key text

⁷² The example of a 'good' *rhētōr*, Aristeides, should not mislead us here. Socrates only claims that Aristeides was not corrupted by the power, and does not suggest that the politician would have succeeded in 'making the Athenians better'. See Dodds (1959) 382 *ad* 526b 2, Irwin (1979) 247 *ad* 526a.

⁷³ English quotations from the *Phaedrus* follow the text of Rowe's (2000) translation, with occasional modifications.

for understanding Plato's views on rhetoric.⁷⁴ Indeed, it is almost a compulsory exercise in Platonic scholarship to compare the two dialogues. As mentioned in the introduction, some interpreters have argued that the *Phaedrus* shows a certain change in the negative picture of rhetoric given in the *Gorgias*, as here Socrates distinguishes between good and bad rhetoric, and while rejecting the latter, he attributes an important role to the former in what he calls ψυχαγωγία.⁷⁵ Others read the dialogue as complementing the argument of the *Gorgias*, by adding positive suggestions to the destructive criticism against sophistry and elaborating on the concept of 'true rhetoric' first mentioned there.⁷⁶ Moreover, the context in which Isocrates is mentioned at the end of the conversation demonstrates, according to some, that Socrates at least hoped there would be a manifest example of the practice of good rhetoric.⁷⁷

In comparing the two dialogues, one has to concentrate on two questions. First, what is the basis of distinction in the *Phaedrus* between good and bad rhetoric; second, how far this distinction can be regarded as a modification of the negative view appearing in the *Gorgias*, or otherwise put, whether Socrates' redefinition of rhetoric makes its contemporary practice appear in a more positive light. Before turning to these questions, I first summarise the argument of the dialogue.

2.1 The Argument of the *Phaedrus*

Unlike in the *Gorgias*, the conversation with Phaedrus starts from the practice of

⁷⁴ See Kennedy (1963) 74, with note 54 for references to earlier scholarship.

⁷⁵ See e.g. Ryle (1966) 259–263, cf. n. 31 above.

⁷⁶ See e.g. Quimby (1979) or, more recently, Yunis (2009) 213. This view entails that the *Gorgias*' criticism is pointed at sophistic rhetoric, as opposed to a non-sophistic one.

⁷⁷ See e.g. Benardete (1991) 192.

composing speeches rather than the teaching of rhetoric. Socrates has Phaedrus read out for him an epideictic speech by Lysias,⁷⁸ the manuscript of which Phaedrus has with him in order to study it in details or even (as Socrates insinuates) to learn it by heart.⁷⁹ Lysias' speech (230e 6–234c 5) aims at proving that a young man ought to give his favours to someone who is not in love with him rather than to someone who is. Socrates expresses his admiration for the wording of the speech, but he finds much to criticise in its structure and content.⁸⁰ To give an example in support of his judgement, he invents a speech *ex abrupto* (237b 2–241d 1), which is a 'corrected version' of the one by Lysias. He then performs another, considerably longer, speech (243e 9–257 b 6), a *παλινωδία* of the first one (see 243b 1), in which he refutes the starting statement his first speech had in common with that of Lysias, i.e. that love is some sort of madness and one has to protect himself against its harmful effects. In this second speech the accuracy of discussion is accompanied by the correctness of content to the greatest extent possible, thus making it a proper example of what Socrates calls 'true rhetoric'.⁸¹

⁷⁸ Opinions on the authorship of the speech diverge. For a summary of earlier views see Guthrie (1975) 433. On stylometric evidence, see e.g. Shorey (1933) and Dimock (1952), but cf. the caveat of Griswold (2002) 131. The most important substantive arguments are discussed (with different conclusions) by Dover (1968) 69–71, de Vries (1969) 12–14, and Rowe (2000) 142–143. It has to be admitted that the weight attributed to any of these arguments depends to a great extent on what practice one (intuitively) thinks to make most sense for Plato in the specific context of the dialogue: to quote Lysias accurately, to adapt one of Lysias' speeches, or to invent one by himself. The most relevant argument seems to be the one made by Taylor (1929) 301–302: being the object of thoroughgoing criticism by Socrates, the speech serves the aims of the argument best if it is not a caricature, given that once Lysias is referred to by name, any invention or addition would readily provoke the objection that Plato enters into shadow boxing. Consequently, one has to agree with Rowe, who believes, 'without any great conviction, that the speech is Lysias' own', even if Plato apparently prefers to reconstruct his opponents' arguments on other occasions (see Rowe, *ibid.*).

⁷⁹ Memorising speeches was a standard way of learning rhetoric and other disciplines, see e.g. *Pl. Prot.* 325e 1–326a 4, cf. Walker (2000) 29–30.

⁸⁰ Linking the question of authenticity to that of Socrates' irony against Isocrates, McAdon (2004a) 26 argues for the possibility that Plato, while speaking of Lysias, in fact means Isocrates.

⁸¹ As we shall see later on in the dialogue, no human being, and consequently no speech can claim to convey truth as it is, but only to have in itself 'grains of truth', see 276c 3–5 with Rowe (2000) 211, *ad loc.* On the contradictions of the second speech and their implications as to Plato's intention, see Nehamas and Woodruff (1995) xliv–xlv.

In the theoretical investigation that follows, Socrates first expands the concept of λογογραφία, making it include all kinds of texts composed in advance of delivery, and discusses the characteristics of good and bad writing in general terms (257c 8–258e 5). Similarly to the *Gorgias*, the first problem is the opposition of appearance and reality, of opinion and knowledge.

Socrates first argues against Polus, who insists on the traditional definition⁸² of rhetoric, that

the science of antilogic is not only concerned with law-courts and public addresses, but, so it seems, there will be this one science – if indeed it is one – in relation to everything that is said, by which a man will be able to make everything which is capable of being made to resemble something else resemble everything which it is capable of being made to resemble, and to bring it to light when someone else makes one thing resemble another and disguises it. (261d 10–e 4)

In order that ψυχαγωγία, which he takes to be the *genus proximum* of rhetoric (cf. 261a 7–8), can take place according to the speaker's intentions, he has to be aware of the similarities and differences of the things discussed, or else he falls victim to opinions rather than persuading other people (262a 5–b 9).

Speaking of the proper composition of speeches, Socrates also takes similarities and differences as his starting point, and he describes two corresponding methods of thinking: definition and division. Yet as Phaedrus remarks, speeches composed upon these principles belong to the domain of dialectic rather than rhetoric (266c 7–d 2).

After a somewhat ironic overview of the authorities on rhetoric and their technical doctrines (266d 9–268a 1), Socrates comes back to the problem of knowledge. Pointing out that authors of current textbooks *do not know* what rhetoric is (269b 5–c 5),⁸³ he explains that expertise in rhetoric as a *technē*, a parallel

⁸² Cf. *Grg.* 452e 1–4 and 454b 5–7, discussed above in section 1.2.

⁸³ Cf. *Grg.* 460e 5–461b 2, and the whole of *Gorgias*' attempt at defining rhetoric.

to the art of medicine,⁸⁴ can only be based on knowledge concerning the soul.

Accordingly, rhetorical textbooks should discuss the soul, its types, and the relation of the different types to different kinds of speeches (271c 10–272b 5).

In light of that, Socrates rejects rhetoric that seeks to persuade with the help of probabilities – a current usually traced back to Tisias of Sicily (273a 8–9), but ascribed by Socrates to the rhetoricians and orators in general (272d 7–273a 2). His conclusion is, then, that

unless someone counts up the various natures of those who are going to listen to him, and is capable of dividing up the things that are according to their forms and embrace each thing one by one under one kind, he will never be an expert in the science of speaking to the degree possible to mankind. (273e 1–4)

The means of acquiring these skills is (dialectical) practice, and its aim is to please the gods rather than to convince the humans by speech and action.

It is in this context that Socrates formulates his well-known ‘critique of writing’ (274b 6–277a 5): composing texts, as well as performing speeches, may be good or bad, depending on the underlying knowledge of the writer/speaker. The aim of a good speech cannot be anything else but instruction,⁸⁵ and writing can have a function only as a supplement to it. Knowledge functions as the guarantee behind writing and speaking, and it is the basis of the distinction between philosophers on the one hand and poets, speech-writers or drafters of laws on the other.

If read in light of the argument of the dialogue and apart from biographical considerations, the praise of Isocrates at the end of the conversation (278e 5–279b 1)⁸⁶ only serves to emphasise Socrates’ distinction between rhetoric and

⁸⁴ Cf. *Grg.* 462d 8–e 2, where rhetoric is argued to be a parallel to cookery, the quasi-*technē* imitating medicine. See sect. 1.3 above.

⁸⁵ Cf. 265d 5, with Rowe (2000) 201 *ad loc.*

⁸⁶ Whether Socrates’ commendation of Isocrates is ironic or not is one of the most controversial issues in the interpretation of the dialogue. See e.g. Kennedy (1963) 79, McAdon (2004a) 25–27.

philosophy. By his talent and virtue, Isocrates is going to excel in ‘the very speeches that he works at now’ among the orators, yet it is also possible that ‘some diviner impulse’ will lead him ‘to greater things’ – i.e. he may give up writing speeches and devote himself to philosophy instead.

2.2 Rhetoric Redefined

As we have seen, Socrates starts the discussion by broadening the definitions of λογογραφία⁸⁷ and rhetoric. In the case of the latter, he has to provide some arguments for his suggestion, as Phaedrus raises an objection:

S: Well then, will not the science of rhetoric as a whole be a kind of leading of the soul by means of things said (διὰ λόγων), not only in law-courts and all other kinds of public gatherings, but in private ones too [...]?
Ph: No, I must say, not absolutely that: a science of speaking and writing is perhaps especially employed in lawsuits, though also in public addresses; I have not heard of any extension of it beyond that. (261a 7–b 6)

What Phaedrus proposes here may be considered the then generally accepted definition of rhetoric. His reference to what he has heard suggests that this was taught by rhetoricians in contemporary Athens. Socrates, in turn, identifies the essence of oratory as ‘speaking in opposition’ (ἀντιλέγουσιν, 261c 5), while he puts to one side the other characteristic of legal disputes, namely the fact

⁸⁷ In addition to the above discussion of the reinterpretation of rhetoric, it may be worthwhile to have a look at how Socrates deals with the concept of *logographia*. Phaedrus mentions that Lysias was called with contempt a speech-writer (λογογράφος) by a politician (257c 4–6). Pretending ignorance, Socrates asks why it would be unacceptable if someone writes *logoi*. Then, starting from the concept of *logos*, he proceeds to the reinterpretation of rhetoric (which he further confirms later, when he speaks about the writing down of *logoi*). In contemporary forensic speeches, λογογράφος was something of a pejorative indeed. It was used for orators who wrote speeches for other people – and were paid for that (see *Schol. vet. ad 257c 1*) – in order that the latter can perform these as their own speeches before the court (on speech-writing in general, see Lavency [1964]). In this sense, λογογράφος referred to those composing forensic speeches, and was not unfitting for Lysias, who did in fact write such speeches for money (see e.g. DH *Lys.* 17). The speech Phaedrus has with himself in writing is, however, not produced for someone involved in a lawsuit, but was performed by Lysias himself, albeit playing the abstract role of ‘the non-lover’. This kind of *logographia*, then, is a different kind of *logographia*. See Yunis (2009) 236, note 13. Going further this way, Socrates expands the sphere of validity of statements on rhetoric, until he arrives at the point of speaking about the composition of any kind of *logos* in general. In this broader perspective, forensic *logoi* are inevitably overshadowed by those composed on the good and the true, not in order to merely persuade but to make a rational argument that compels the hearer to accept it.

that the controversy is about ‘what is just and unjust’ (cf. 261c 8).⁸⁸ On the other hand, he adds that both in law-courts and in public addresses (ἐν δημηγορίᾳ) orators sometimes make the same things appear (φανῆναι, δοκεῖν) just or good, sometimes unjust or bad (261c 11–d 1, 3–4). Appearance, then, becomes the second element of the definition of the object of rhetoric. The size of the audience, in turn, is not discussed any further.

As the subsequent discussion shows, this redefinition of rhetoric helps to make sense of Lysias’ speech as a piece of oratory,⁸⁹ i.e. something that can be examined in light of the principles of rhetoric as *technē*. In a broader context, however, it allows Socrates to go on inquiring about these very principles. The first one he formulates as ‘every speech should be put together like a living creature, as it were with a body of its own, so as not to lack either a head or feet, but to have both middle parts and extremities, so as to fit both each other and the whole’ (264c 2–5). He then describes the organising method of his own speeches as ‘divisions and collections’ (265c 9–266b 7), which he ascribes to the ‘experts of dialectic’ (266c 1).

As a next step, Socrates confronts these methodological requirements with current doctrines of rhetoric. When he asks whether rhetoricians teach dialectic, Phaedrus, once again, tries to object:

Ph: [...] While you seem to me to call this kind of thing by the right name, when you call it dialectical, the rhetorical kind seems to me still to elude us.
S: [...] Could there be anything fine, anywhere, which is divorced from these things and is nonetheless grasped in a scientific way? We [...] must say just what that part of rhetoric is which is being left out. (266c 6–d 6)

⁸⁸ Plato seems to attribute less importance to the respective values aimed at by different kinds of rhetoric than Aristotle. See Hellwig (1973) 65–67, and n. 19 above.

⁸⁹ As Socrates is going to suggest it at 262c 5–7. He does not point out, however, nor does Phaedrus seem to be aware, that without this broader definition, the speech would not qualify as an object of rhetoric. Lysias’ product is in fact a strange hybrid: we might identify it as a private deliberative speech on the one hand (according to its setting), and a public epideictic speech on the other (according to its function). On the importance of the difference between private conversation and public speaking, see sect. 2.3 below.

In what follows, Socrates shows himself well acquainted with contemporary textbooks on rhetoric,⁹⁰ as he gives a brief overview of their main doctrines concerning the structure of speeches, the kinds of proof, and elements of style. Examining ‘what the power of the science is which is contained in them’,⁹¹ however, he explains why he thinks ‘their warp has some gaps in it’ (268a 6): from the fact that their authors do not know dialectic follows that they cannot define rhetoric, which, in turn, leads them to false beliefs concerning what they would have to teach their pupils (269b 6–c 5).⁹²

Dialectic, then, which is the common method of all *technai*, was proven to be an inevitable part of rhetoric as well. Since rhetoricians do not practise, or know, dialectic, they do not know how to make a persuasive speech, but what is even worse, they do not know what their subject is about either. Thus, Phaedrus’ attempt to make a distinction between rhetoric and dialectic was clearly refuted by Socrates. He has shown not only that dialectic cannot be separated from rhetoric, but also that without using *the* scientific method, one cannot be sure whether something is relevant to a certain *technē* or not, and, consequently, demonstrated that the rhetoricians’ doctrines are of questionable value to say the least.⁹³

Having added dialectic to the core of rhetoric and rejected practically everything that is generally thought to belong to it, Socrates continues by introducing further necessary elements of the *technē*. These are related to the aims served by speaking on the one hand and to the ways of speaking on the other.

⁹⁰ Even if he denies himself to be an expert in the field: see 234d 5–7, also in practice: *Apol.* 17a 3–d 3.

⁹¹ Phaedrus apparently misunderstands τῆς τέχνης δύναμιν, taking it to refer to the efficiency of oratory, as he responds ‘[a] very forceful power it is, Socrates, when it’s a question of mass gatherings’ (268a 2–5). On Socrates’ answer (ἔχει γάρ), cf. Rowe (2000) 204 *ad* 269c 6–272b 6.

⁹² As in the case, again, of Gorgias. Cf. n. 60 and accompanying text above.

⁹³ See Rowe (2000) 204 *ad* 269c 6–272b 6.

According to the doctrines of ‘ordinary’ rhetoric, the aim of the orator is to persuade his audience. This is what Phaedrus implies when he says that rhetoricians think it is unnecessary to understand what is just (τὰ τῷ ὄντι δίκαια), since it is the appearance of justice that persuades (259e 7–260a 4). Socrates first seems to accept this, but in his definition he describes rhetoric as ‘a kind of leading the soul’ (ψυχαγωγία τις, 261a 7–8). When emphasising the importance of knowing the truth about the subject matter of one’s speech, he still speaks of deception (ἀπάτη, see 261e 6, 262a 5, 263b 3). Yet as soon as he starts to discuss the merits and functioning of dialectic, he tacitly replaces appearances and deception with ‘teaching’ (διδάσκειν, 265d 5).⁹⁴ While persuasion and conviction are not dropped altogether, the direction in which oratory should lead the souls is formulated more clearly when Socrates, once again, compares rhetoric to medicine: ‘to pass on to the other whatever virtuous conviction you wish by applying words (λόγους) and practices in conformance with law and custom (ἐπιτηδεύσεις νομίμους)’ (270b 7–9).

Speaking the truth as the proper purpose of rhetoric is introduced only indirectly: first by a negative example, then through the description of the final aim of all human activities. The example is one by Tisias, who allegedly

wrote to the effect that if a weak but brave man beats up a strong coward and steals his cloak or something else of his, and is taken to court for it, then neither party should speak the truth; the coward should say that he wasn’t beaten up by the brave man single-handed, while the other man should establish that they were on their own together, and should resort to the well-known argument, ‘how could a man like me have assaulted a man like him?’ The coward will certainly not admit his cowardice, but will try to invent some other lie and perhaps offer an opening for his opponent to refute him. (273b 4–c 2)

As Tisias’ example is intended to illustrate the principle of εἰκός, it is probably not shame that makes the strong man lie, but the consideration that his audience would believe that a strong man usually is brave. By this principle, then, the truth has to be concealed in order that justice prevails. In his response, Socrates

⁹⁴ As pointed out by Rowe (2000) 201 *ad loc.*

first points out that ‘probability comes about in the minds of ordinary people because of a resemblance to the truth’ and that therefore knowing the truth is the best way to successfully arguing with probabilities (273d 4–7). He then goes on to say that knowledge should be acquired ‘not for the purpose of speaking and acting in relation to men’, but to please the gods. Still, what is ‘gratifying to the gods’ is at the same time the most useful for human purposes (273e 5–274a 5). At this point, Socrates moves on to the next problem, that of writing, but throughout his discussion of writing, the focus is on *how* to teach, without opposing persuasion to teaching. Rather, the ability to teach goes hand in hand with the ability to help oneself through speaking (αὐτοῖς λόγῳ βοηθεῖν, see 276c 8–9).⁹⁵ In the final summary of the argument, teaching and persuasion are first mentioned, again as parallels (277c 5), which might allow for a choice between them, but a few sentences later (277e 7–278a 6), distinguishing between what is ἄξιον σπουδῆς and what is not, speaking ‘without questioning or teaching to produce conviction’ (277e 8–9) is clearly put in the latter group, while ‘clearness and completeness and seriousness exist only in those things that are taught about what is just and fine and good, and are said for the purpose of someone’s learning from them’ (278a 2–5).

Alongside the use of dialectic and the moral value of teaching, the knowledge of speaking persuasively is among the requirements of ‘true’ rhetoric as well. While this may seem to be a part of the common rhetorical doctrine Socrates preserves, we have seen that part of his criticism on the authors of textbooks was that they could not teach how to speak persuasively.

Having defined oratory as a sort of ψυχαγωγία,⁹⁶ Socrates can logically

⁹⁵ Cf. 275e 1–5, 276a 5–7, where the choice between speaking and keeping silent is mentioned.

⁹⁶ He first describes rhetoric as ψυχαγωγία τις (261a 7–8), then he formulates more precisely, saying

claim that the science of rhetoric should focus on the types of the soul rather than on matters discussed in the textbooks. The student of rhetoric has to learn the correspondences between different kinds of speeches and different kinds of souls, and to recognise these latter in practice so he can know how to speak to what kind of person (271d 5–272a 3). To speak in various styles belongs to the practical part of the *technē*, as well as the knowledge of when to speak (and then in what way) and when to ‘hold back’ (272a 3–6).

The kinds of speeches and of souls are mentioned again in the final summary (277b 9–c 3). Here Socrates speaks of simple (ἀπλοῦς) and complex (ποικίλος) souls as well as simple and complex speeches. Thus, the main distinction is between people who need παναρμονίος speeches in order to be persuaded, making use of all sorts of rhetorical devices, and those who do not.⁹⁷

These aspects of persuasive speaking are, however, not ends in themselves. Nor is persuasion. They are, as we have seen, subordinate to the aim of teaching or rather, in the proper sense of Socratic ψυχαγωγία,⁹⁸ of leading people to philosophy. Persuasion alone is not a subject worthy of scientific attention at all. In the philosophical framework of Socrates’ ‘true’ rhetoric, in turn, it becomes of secondary importance. What we witness here is a radical rearrangement of the elements of ‘ordinary’ rhetoric, some of which are even replaced by new ones.

2.3 What Remains of Public Speaking?

At the end of the *Phaedrus*, we are left with a concept of rhetoric that is completely

that ‘[s]ince the power of speech (λόγου δύναμις) is in fact a leading of the soul, the man who is going to be an expert in rhetoric must know how many forms soul has’ (271c 10–d 2).

⁹⁷ For the explanation of ἀπλός and ποικίλος, see Rowe (2000) 212–213 *ad* 277c 2–3.

⁹⁸ On Plato’s use of ψυχαγωγία, as a parallel to his reinterpretation of ‘rhetoric’ see Asmis (1992) 359, of ‘logographia’ see Yunis (2009) 236, note 13.

different from the one taught by contemporary rhetoricians and echoed by Phaedrus.⁹⁹ As I have tried to show so far, Socrates first adds dialectic to the necessary elements of rhetoric, then with the help of dialectic he questions virtually everything else that is contained in the textbooks of rhetoric, and finally he introduces further elements that seem to be irrelevant for ‘ordinary’ rhetoric.¹⁰⁰ The question is, then, whether Socrates’ ‘true’ rhetoric leaves any space for ‘ordinary’ rhetoric and oratory, in particular legal rhetoric and oratory.

Discussing the consequences of the Socratic transformation of rhetoric, Christopher Rowe remarks that

there will, of course, still be a place for public speaking too, and there will be a right and a wrong way of doing it. But the implication of the present argument is that it will be ineffective in achieving its purposes, to the extent that it lacks the conditions necessary for true communication and teaching.¹⁰¹

Certainly, Socrates never says that there is no place for speaking to audiences consisting of more than one person or that one should not take care how to address a court or an assembly. Yet we have seen in the *Gorgias* that he does not hesitate to assign a function to oratory that seems quite absurd to his interlocutors.¹⁰²

Therefore, it seems worthwhile to have a look at what place there remains for such practices if one takes the second part of Rowe’s comment seriously.

Let us begin with the purposes. According to the starting definition of Socrates (261c 11–d 4), both legal and deliberative rhetoric have the aim of making the same things appear as just or good in some cases, then unjust or bad in others, irrespectively of what their true quality is. For the purposes of the speech, however,

⁹⁹ See, in a similar vein, Calvo (1992) 60. I do not think, however, that Plato’s ‘true rhetoric’ would become, as Calvo puts it, ‘essentially identified with philosophical Dialectics’. Dialectic is certainly the key of Plato’s redefinition of rhetoric, but a distinction can still be made between the two, cf. Rowe (1992) 35.

¹⁰⁰ Cf. Rowe (2000) 211 *ad* 276c 3–5.

¹⁰¹ Rowe (2000) 211–212 *ad* 276c 3–5.

¹⁰² See *Grg.* 480b 7–481b 1, discussed above in sect. 1.5.

it is necessary that the speaker know these qualities. As the argument proceeds, the original aim of the orator is replaced with teaching, thus making it parallel to the theory of rhetoric. At this point, good oratory and rhetoric have a morally positive aim, while their bad counterparts serve the selfish interests of the speaker/teacher only.¹⁰³ How does this work in the typical situations of legal and deliberative oratory?

In a legal dispute before a court, there is a controversy between two parties who have different interests. In this controversy, the one party necessarily has to claim that something was or is just, while the other has to argue for the opposite.¹⁰⁴ How is this compatible with teaching? If the speakers are to speak persuasively and according to their interests, they have to know the truth about justice and injustice in the given case. If, however, they both are exponents of 'true' rhetoric in the sense that they not only know but also try to convey the truth, then no real debate can arise between them. Socratic rhetoric works in a legal context only if we presuppose that only one of the parties makes use of it and the other is completely ignorant in terms of justice. Were this not the case, then the two parties would enter into a dialectic conversation and the one could persuade the other, without having to resort to the judiciary. Yet if the debate arises because of the opponent's ignorance, the main task of the orator is to dispel this ignorance as far as possible, again by way of conversation rather than addressing a larger audience. It is only in the worst case that the speaker may have to prevent injustice by persuading, without even attempting to enlighten, the audience. This situation, however, would

¹⁰³ This makes the relationship between the orator or rhetorician and their respective audiences similar to that between the lover and the beloved, discussed in the speeches in the first part of the dialogue. Cf. Rowe (2000) 212 *ad* 276c 3–5, and Calvo (1992).

¹⁰⁴ The only exception may be the case described in the *Gorgias* (see also n. 66 and accompanying text above), where one uses oratory to persuade the court about one's being guilty. This, however, is a marginal case, one that may be hardly considered to belong to the field of 'ordinary' rhetoric.

be one where ‘it is better to suffer injustice than to commit it’. As the *Apology* shows, Plato’s Socrates at least preferred teaching to saving his life.

Unlike legal rhetoric, deliberative speeches are not necessarily employed in a debate.¹⁰⁵ Thus, the teaching function of this kind of rhetoric can be more reasonably considered. Socrates’ two speeches are examples of this genre, even if they are Socratic also in the sense that their addressee is a single person rather than an assembly. The mention made of Pericles (269e 1–270a 8) hints at deliberative oratory, too. While it is Pericles’ rhetorical skill that is discussed here,¹⁰⁶ not his practice of speaking, one may remember Socrates’ negative appraisal of his statesmanship in the *Gorgias* (503c 1–d 3, 515b 8–d 3). There, it was exactly his failure to make the Athenians better what was criticised by Socrates, and it is clear from the context that the way he could have improved his fellow citizens morally was his public addresses.¹⁰⁷

The theoretical possibility of teaching through public speaking brings us to the practical question of efficiency. How likely is the orator to succeed in instructing a larger audience? The key to successful speaking, whether aiming at persuasion or teaching, is, according to Socrates, the knowledge of souls (see 271c 10–272b 2). It is on the basis of this knowledge that the orator can determine the right way of speaking, matching, as it were, a certain kind of speech to a certain kind of soul. As Socrates shows, the fact that contemporary rhetorical doctrine

¹⁰⁵ At least Socrates never says this. He speaks of ἀντιλέγειν in the context of judicial rhetoric (261c 5–7), but then interprets it as making the same thing appear just/unjust (in legal cases) or good/bad (in deliberative speeches) at different times (261c 11–d 4). Moreover, the parallel with medicine (cf. *Lg.* 720a 2–e 5) shows that in certain cases it is not the explicitly formulated opinion of an adversary but the ignorance of the audience that has to be fought against.

¹⁰⁶ Here, as in the case of Isocrates, scholars disagree as to the genuineness of Socrates’ praise of Pericles’ rhetorical talent. It is affirmed by e.g. Hackforth (1952) 145–146, de Vries (1969) 233 *ad loc.*, and – to my mind convincingly – rejected by e.g. Guthrie (1975) 432 and Rowe (2000) 204 *ad loc.*

¹⁰⁷ *Pace* de Vries (1969) 233 *ad loc.*, who claims that ‘[i]n the *Gorg.* his statesmanship is in question [...]. Here his rhetorical gifts are praised.’ For the opposite view, see Guthrie and Rowe (references in the previous note).

focuses on probability (272d 2–273c 5) does not make studying the souls irrelevant (273d 2–e 4). On the contrary, what is probable is always probable for a certain person having a certain kind of soul (271e 2–272a 3).

Given all that, it is not the ‘scientific’ part of rhetoric that becomes problematic when addressing several persons at the same time, but the practical task of identifying the respective nature of their souls. Mere persuasion may be achieved, albeit with less certainty, by arguing from probability, with no respect for truth or the audience, but teaching requires something more.

In what can be understood as the ‘paradigmatic case’ of Socratic rhetoric, it is not the audience that is given, but the knowledge the speaker wishes to pass on. Coming to the end of the dialogue, just before summarising the main points of his argument, Socrates describes what he thinks the best way to make use of *logoi*:

[...] when a man makes use of the science of dialectic, and taking a fitting soul plants and sows in it words accompanied by knowledge, which are able to help themselves and the man who planted them, and are not without fruit but contain a seed, from which others grow in other soils, capable of rendering it for ever immortal, and making the one who has it as happy as it is possible for a man to be. (276 e5–277 a4)

Here, the *logoi* make happy those possessing them (τὸν ἔχοντα εὐδαιμονεῖν ποιοῦντες, 277a 3) by the very fact of possession, and do not serve any other aim. Accordingly, they are not invented to be instrumental in achieving a practical aim. Rather, the focus is on selecting the soul suitable for carrying the seeds of truth and on planting them in it.

In the case of public speaking, such a selection cannot take place. The speaker has to address a large group of people¹⁰⁸ representing the whole of the community, also in terms of the variety of their souls. Therefore, it makes sense for the ‘ordinary’ orator to concentrate on what is probable, which is ‘just what most

¹⁰⁸ Cf. Phaedrus’ remark (ἐν γε δὴ πλήθους συνόδοις) concerning the power of rhetorical devices at 268a 3–4.

people think to be the case' (273a 8–b 1), leaving finer distinctions aside. Yet as the example given by Socrates for εἰκός arguments in a legal case shows, this way of thinking leads to the conclusion that 'neither party should speak the truth' (273b 6), not even the one whose case would be supported by it.

The problem of efficiency under the conditions of 'ordinary' rhetoric thus leaves us with a dilemma. Either the orator tries to speak according to the principles of the *technē*, which cannot really be applied to the situation, and consequently he is likely not to accomplish the aim of ψυχαγωγία, or he adapts his speech to the situation in order to be persuasive, in which case he is not going to live up to the requirements of 'true' rhetoric.

It is often pointed out that in the theory of rhetoric laid out by Socrates, no distinction can be made between the practice and the teaching of rhetoric.¹⁰⁹ This is certainly true in so far as both activities encompass the use of *logoi*. Yet as far as public speaking is concerned, the above considerations indicate two profound differences between its theory and practice. The first one is the one just mentioned. The philosopher-rhetorician can follow Socrates' advice, picking, as it were, the able-minded pupils and instructing them on ψυχαγωγία as well as substantive questions of justice and injustice. The pupils, once they come to practise what they have learnt, cannot do the same. Their only choice in terms of the circumstances can be whether to speak or not to speak. And it seems that the person imbued with 'true' rhetoric would opt for the latter, unless he is forced into a situation where it is τῷ νόμῳ πειστέον καὶ ἀπολογητέον.¹¹⁰ There is, to be sure, an alternative to speaking: writing. In the case of written *logoi*, it is not necessary for the author to

¹⁰⁹ See e.g. Rowe (2000) 211 *ad* 276c 3–5.

¹¹⁰ This may suggest that Socrates actually means it at *Ap.* 19a 5 rather than just using another commonplace of anti-rhetoric.

assess the audience on the spot as the written text can wait for the suitable recipient. Given the Socratic criteria for such texts, however, pieces of ‘ordinary’ rhetoric would hardly qualify as worth writing down.¹¹¹

The second difference is related to the ‘afterlife’ of the speech, and is the most clearly shown in judicial oratory. While the knowledge taught by way of conversation (or, for that matter, reading) is conceived of as a seed that is going to grow and bear fruits if everything goes well, in the case of a judicial speech its fruits are to be harvested rather prematurely. To put it differently, the teaching of rhetoric can be carried out in a dialectic way – as we have seen – and there is time for the pupils to reflect on what they were taught. A court trial, however, is aimed at deciding a case. Thus, even if knowledge is conveyed by a speech, reflection on it from on part of the judges will merely consist of assessing whether it is relevant to the case or not and deciding accordingly. Any further improvement of the audience will be outside of the given situation.

Coming back to the view quoted above, we may say that as far as the *Phaedrus* is concerned, public speaking will certainly exist, and there are means to distinguish between better and worse ways of doing it. Yet ‘ordinary rhetoric’, and its judicial branch in particular, is tacitly omitted in Socrates’ theory. The reason for this may be that it simply does not fit into the newly fashioned framework of ‘true’ rhetoric. The fundamental changes in the aims of rhetoric bring with themselves a change of its means as well. What originally served as the model for rhetorical theory cannot be grasped by it any more.

¹¹¹ One is tempted to think that the only such text is Plato’s *oeuvre*. Cf. e.g. Rowe (1992) 35 and, more recently, Rowe (2007) on Plato’s dialogues as examples of ‘philosophical oratory’.

3 The *Laws*

Unlike in the *Gorgias* and the *Phaedrus*, the speakers of the *Laws*¹¹² do not pay special attention to the problem of rhetoric. In fact, public speeches in the sense of ‘ordinary’ rhetoric are hardly mentioned at all. What makes the dialogue still relevant for the present discussion is the emphasis on persuasion, which is however somewhat different from that of the other two dialogues, in so far as the function and conditions of persuasion by the lawgiver are scrutinised in details, while there are only a few passages dealing with actual public speaking.¹¹³ This, in turn, highlights the tension between the different kinds of persuasion.

In this chapter, I first look at the relationship between the legislator’s use of persuasion and ‘ordinary’ rhetoric. Then I turn to those few passages dealing with the latter, to see what place there is (if any) for judicial oratory in Plato’s ‘second best’ constitution.

While there seems to be no point in giving a summary of the whole dialogue, it may be in order to briefly reconstruct the context in which the problem of persuasion comes to the fore.

The *Laws* consists of a conversation between three people on the way from Cnosus to the shrine of Zeus on Mount Ida. The main speaker in this case is not Socrates but an Athenian who is not otherwise identified, with Clinias of Crete and Megillus of Lacedaemon as his interlocutors. Having two companions who represent the two ‘ideal constitutions’ of the time,¹¹⁴ the Athenian suggests to discuss ‘the subject of government and laws’ (625a 6–7).

¹¹² English quotations are from the translation of Saunders (1970), with occasional modifications.

¹¹³ Not including the ‘preamble’ to the Magnesian code of laws (discussed in sect. 3.1.2 below) which takes the form of a speech addressing the citizens.

¹¹⁴ See Morrow (1960) 19–20.

Having discussed at the outset the divine origin of Cretan and Spartan laws (624a 1–625a 3), Clinias and Megillus are rather surprised when they hear the Athenian criticising their constitutions for concentrating on just one part of virtue (i.e. on courage) rather than the whole of it. He is quick to add, however, that it cannot be the divine(ly inspired) lawgiver, who limited the scope of the laws this way (630b 8–631a 4). The problem, as always, has to be with the reconstruction of the legislator's intent (630d 4–7). Moreover, if the original lawgiver must, as one assumes, have aimed at the totality of virtue, then it is only the further human implementations of the original intent, i.e. the current laws of the two states, that can and indeed have to be criticised in the light of that intent (see 634a 1–635a 5).

After explaining to his interlocutors what kind of a hierarchy of virtues one should use as the benchmark for appraising the laws of any given *polis*, and discussing with them some of the political principles that follow from his conception of virtue (Books 1 to 3), the Athenian raises the question of how these conclusions could be tested (702b 1–3). Quite appositely, Clinias reveals that he is going to be one of the ten men appointed by the Cnosians to found a colony, Magnesia,¹¹⁵ with settlers from 'the most part of Crete' and to frame laws for the new city. Thus, he proposes that they could discuss the outlines of a whole new legal order based on the principles suggested by the Athenian, which could then serve as the basis of his law-making activity (702b 4–d 5).

Before turning to the actual rules that regulate the shape of the new constitution and the life of the citizens, the Athenian explains two things: first, the circumstances under which the colony should be founded, and second, the role of law in a real *politeia*.¹¹⁶ As the laws have, by definition, to be 'established for the

¹¹⁵ The name does not appear before Book 8 (848d 3), see Morrow (1960) 31, note 59.

¹¹⁶ As opposed to the city where citizens are *στρασιώται* rather than *πολίται*, see 715b 5.

good of the whole *polis*' (715b 4), this common good is best served if 'law is the master of the government and the government is its slave' (715d 4–5). Accordingly, every citizen of the *polis* has to abide by these rules. As the Athenian puts it after the first part of his fictitious address to the colonists of the new *polis*, '[t]he laws' method will be partly persuasion and partly (when they have to deal with characters that defy persuasion) compulsion and chastisement; and with the good wishes of the gods they will make our *polis* happy and prosperous' (718b 2–5).

The role of laws in the life of the *polis* and the twofold means of persuasion and coercion also appear among the topics discussed in the *Statesman*, another late dialogue of Plato. It seems in order here to have a look at the brief passage where rhetoric is mentioned by the protagonist of that dialogue, a stranger from Elea, among the *technai*¹¹⁷ that serve as auxiliaries of the political science (πολιτική ἐπιστήμη):

Stranger: And the science which decides whether to persuade or not should control that which can persuade? Younger Socrates: Certainly. Str: Well, then, to what science (ἐπιστήμη) shall we assign the power of persuading a multitude or a mob (πλήθους τε καὶ ὄχλου) by telling edifying stories (διὰ μυθολογίας), not by teaching (μὴ διὰ διδαχῆς)? Soc: It is, I think, clear that this must be added to rhetoric (ῥητορικῇ). Str: But the power of deciding whether some action, no matter what, should be taken, either by persuasion or by some exercise of force, in relation to any person, or whether to take no action at all—to what science is that to be assigned? Soc: To the science which controls the sciences of persuasion and speech. Str: And that would, I think, be no other than the function of the statesman (ἡ τοῦ πολιτικοῦ δύναμις). Soc: A most excellent conclusion. Str: So rhetoric also seems to have been quickly separated from statesmanship as a different species, subservient (ὑπηρετοῦν) to the other. (304c 7–e 1)

Previously, it has been made clear that rhetoric here means 'that kind of oratory which partakes of the kingly art (βασιλικῇ κοινωνοῦσα ῥητορεία) because it persuades men to justice (πείθουσα τὸ δίκαιον) and thereby helps to steer (συνδιακυβεῖν) the ship of state' (303e 10–304a 2), being thus similar to strategy and adjudication. What we have here, then, under the name of 'rhetoric' is

¹¹⁷ *Epistēmē* and *technē* are used in these passages as synonyms, cf. 304e 5–6 (speaking of strategy): εἴτε αὐτὴν ἄτεχνον εἴτε ἐντεχνον ἐροῦμεν;

something that differs from rhetoric as defined by Gorgias but also from the philosophical rhetoric described in the *Phaedrus*: it addresses the public and does not teach, but it only persuades to what is just. As it is meant to serve the political science through making the citizens follow the rules without compulsion, it seems to correspond to the ‘true rhetoric’ Socrates mentions in the *Gorgias*. This impression seems to be further supported by the mentioning of μυθολογία, the means of rhetorical persuasion according to the Stranger, which is just what Socrates makes use of in the *Gorgias*.¹¹⁸

Coming back to the *Laws*, let us now see how the Athenian tries to strike a balance between the two means of making citizens observe the laws, and whether Socrates’ ‘true rhetoric’ plays a role in that endeavour.

3.1 The Persuasive Lawgiver

3.1.1 Education

The importance of convincing those who will have to obey the laws is a recurrent theme in the Athenian’s discussion of the Magnesian legal system. The process starts with the education of children, where the proper means ‘of leading children to accept right principles as enunciated by the law and endorsed as genuinely correct by men who have high moral standards and are full of years and experience’ (659d 1–4) have to be selected. This is the reason e.g. for the serious vetting of songs, which are among the most effective devices of inculcating the young with the desirable moral values by way of examples (659d 4–660a 8).

The immediate aim of education is that children have the same conception of pain and pleasure as their elders, i.e. those sanctioned by the laws (659d 4–e 1).

¹¹⁸ See n. 68 above.

How morals follow from that is illuminated at 660d 11–663d 5, where the Athenian explains that happiness or pleasure and the good are not opposites, as is often believed by people who do not think about the *real meaning* of these words. It is, he argues, of utmost importance to eradicate this false opposition from the minds of the citizens.

So the argument that does not drive a wedge between ‘pleasant’ on the one hand and ‘just’ and ‘fine’ and ‘good’ on the other, even if it achieves nothing else, will do something to persuade a man to live a just and pious life. This means that any teaching which denies the truth of all this is, from the lawgiver’s standpoint, a complete disgrace and his worst enemy. (Nobody would willingly agree to do something which would not bring him more pleasure than pain.) (663a 9–b 6)

On the one hand, then, conceptions of pleasure are important for the legislator because they influence the citizens’ decisions concerning whether or not to follow the rules. Yet, on the other hand, pleasure is important not only as something to persuade people about, but also as a factor of persuasion. While unreflected pleasure cannot be the criterion of deciding whether something is good or not (see e.g. 658e 6–659a 4), it can be used to make the common values of the *polis* more palatable, as it were, for those who have to accept it, as it is shown by the Athenian’s parallel between educating (or rather ‘charming’) through songs and ‘to administer the proper diet in tasty foods and drinks’ (659e 3–660a 2).

The use of pleasure in persuasion leads to the problem of the relationship between persuasion and truth. After Cleinias expresses his agreement with the Athenian’s argument concerning justice and happiness (663d 5), the Athenian raises that problem. Even if the previous argument were false, he says, it would be very useful in making people follow justice without coercing them (663d 6–e 2). As young people are easy to persuade, the legislator only has to

consider and discover nothing else than by which conviction (τί πείσας) he would do the *polis* most good; in that connexion, he must think up every possible device (πᾶσαν μηχανήν) to ensure that as far as possible the entire community preserves in its songs and stories and doctrines an absolute and lifelong unanimity. (664a 2–7)

Ἐπ' ἀγαθῷ ψεύδεσθαι (663d 8) appears here as an admissible device of education. This seems to be rather far remote from the *Gorgias*' condemnation of rhetoric, where Socrates expressed his disapproval of both its ends and its means. That the lawgiver always seeks what is best for the *polis* is beyond doubt. But what about the use of lies in the service of those aims?

It should be noted that the Athenian does not say his argument was in fact false.¹¹⁹ Indeed, he soon states that

the central point of these [i.e. the doctrines communicated through songs] should be that the gods say the best life does in fact bring most pleasure. If we do that, we shall be telling the plain truth (ἀληθέστατα), and we shall convince those whom we have to convince more effectively than if we advanced any other doctrine. (664b 7–c 2)

Πεύδεσθαι, then, may refer to the form of fictitious stories (μυθολόγημα), through which the songs express the ἀληθέστατα.¹²⁰

Yet does even this kind of ψεύδος allow for rational persuasion? I think it does, at least for a persuasion of limited rationality, which Plato seems to have in mind in the context of political discourse.¹²¹ The songs that admittedly function as ἐπῶδες,¹²² to be sure, cannot be understood as a means of rational persuasion. Yet by bringing about (true) convictions they set the basis for it. It is through this kind of education that the use of moral language will be the same in the whole of the political community. Once 'good' and 'pleasant' are not considered to be opposites, the legislator can start with the more detailed explanation for which the preambles of the specific laws are the best example.

¹¹⁹ This point is rightly emphasised by Cohen (1993) 306, note 35.

¹²⁰ Similarly Nightingale (1993) 295–296, who, however, denies that persuasion in the *Laws* would be rational.

¹²¹ See Mesch (2003) 62, cf. Bobonich (1991).

¹²² On the different senses of ἐπῶδες in the *Laws*, see Helmig (2003), esp. 77–78. On the Platonic parallels between magic and rhetoric in general, see de Romilly (1975) 23–43.

Persuasion, then, can happen in different ways.¹²³ The first version, which may be adequately termed ‘indoctrination’ and works best with children,¹²⁴ has the aim of establishing commonly shared moral principles. The second kind has to aim somewhat higher, to make the citizens willingly accept a certain legal regulation. To this sort of persuasion we shall now turn.

3.1.2 Preambles

As elsewhere in the *Laws*, theoretical considerations precede practical suggestions concerning preambles. The Athenian introduces the method of legislation through a parallel with arts: ‘the spoken word, and in general all compositions that involve using the voice, employ “preludes” (προοίμια), a sort of limbering up, so to speak, and these introductions are artistically designed to aid the coming performance’ (722d 3–6). He emphasises the lack of such introductory parts in legislation by making a pun on νόμος: while lyric odes (νόμοι) have preludes, ‘in the case of the real *nomoi* [i.e. laws], the kind we call “administrative” (πολιτικούς), nobody has ever so much as breathed the word “prelude” (προοίμιον) or composed one and given it to the world; the assumption has been that such thing would be repugnant to nature’ (722e 1–4). The nature of things would, however, require it: ‘the reason why the legislator gave that entire persuasive address (πειστικόν) was to make the person to whom he promulgated his law accept his orders – the law – in a more co-operative frame of mind (εὐμενῶς) and with a correspondingly greater readiness to learn (εὐμαθέστερον)’ (723a 4–8).

¹²³ Cf. 663c 1–2, where the Athenian refers to the various means of the legislator to bring about true convictions in terms of justice and pleasure: πείσει ἄμῳς γέ πως ἔθεσι καὶ ἐπαίνοις καὶ λόγοις.

¹²⁴ See Bobonich (1991) 373–374, who points out, arguing against Morrow (1953), that ἐπωδή is mentioned almost exclusively in connection with the education of children. Nevertheless, Plato’s usage makes clear that all the ways of making children believe what they ought to believe qualify as persuasion: see the previous note.

Accordingly, the Athenian suggests that ‘all laws have their preambles and [...] the first task must be to preface the text of each part of the legal code (πάσης [...] νομοθεσίας) with the appropriate introduction (τὸ πεφυκὸς προοίμιον)’ (723c 2–4). This, however, is not to say that every single rule has to have a preamble attached to it. While it is by no means contrary to nature (cf. 722e 3–4) to explain every piece of regulation by way of preambles (πέφυκέν γε εἶναι πᾶσιν, 723d 1–2), these do not necessarily have to be used everywhere (οὐ χρηστὸν ἅπασιν, 723d 2). Where they are indispensable is ‘the permanent body of laws (πρὸ πάντων [...] ἀεὶ τῶν νόμων) and the individual subdivisions (καθ’ ἑκάστον)’ (723b 4–5), this latter referring to the ‘chapters’ of the law-code, i.e. parts containing rules on a well-defined aspect of life. Let us now have a look at the actual preambles proposed by the Athenian to see how they work.

As for the general preamble of the law-code of Magnesia, it is composed in two steps. The first half, which covers ‘the gods and the powers below them, and [...] parents living and dead’, is described as such only afterwards (723e 6, 724a 3),¹²⁵ when the Athenian is about to deliver the second half, on the topic of ‘how far a man should concentrate or relax the efforts he devotes to looking after his soul, his body, and his property’ (724a 7–b 1).

The first part of the preamble begins with a reference to a παλαιὸς λόγος, according to which there is a god who rewards the just and punishes the unjust. The clause πρὸς ταῦτ’ οὖν οὕτω διατεταγμένα presumably marks the end of the *logos*, and introduces the transition (716b 5–d 4) to the consequences the Athenian draws in terms of human behaviour (716d 4–718a 6). These consequences consist of recommending the virtue of σωφροσύνη on the one hand, and a list of actual duties

¹²⁵ Cf. 723d 5–e 4, comparing their current discussion to their previous conversation on the same topic. At 715e 3–5, before the beginning of the first half, the Athenian only says that they should address the newly arrived colonists with a speech (ἄρ’ οὐχ [...] διαπεραντέον ἄν εἴη λόγον;).

as to the gods, spirits, heroes and parents on the other.

The second, much longer, half first concentrates on the right way of dealing with one's soul, body, and wealth, which is followed by advice concerning one's duties towards children, relatives, friends, the state and foreigners. In the final part, the Athenian comes back to particular aspects of personal morality and responsibility. He closes the address by arguing that the good life as described by the laws is identical to the pleasant life, and adds that

the life of physical fitness, and spiritual virtue too, is not only pleasanter than the life of depravity, but superior in other ways as well: it makes for beauty, an upright posture, efficiency and a good reputation, so that if a man lives a life like that it will make his whole existence infinitely happier than his opposite number's. (734d 4–e 2)

To what extent can this general preamble be supposed to contribute to the acceptance of the legal rules that follow it? Looking at it as a speech that is intended to bring its addressees 'into a more co-operative frame of mind' and to increase their 'readiness to learn',¹²⁶ we may say that it doubtless arouses certain expectations in the audience. It repeatedly emphasises that living a virtuous life is the way to have more pleasure than pain, and it also says that the legislators are going to 'list and classify certain things as disgraceful and wicked, and others as fine and good' (728a 5–7), which then serve as the measure of human actions. Thus, it certainly conveys the promise of a happy life, if one is to abide by the rules.

The definition of happiness, in turn, seems somewhat problematic. While the claim that every human being strives for pleasure and avoids pain does not seem very difficult to argue for, it is far from obvious that the ways to pleasure as described in the preamble are generally accepted. As the example of the *Gorgias* shows, the Socratic arguments in favour of σωφροσύνη and against ἀκολασία do

¹²⁶ Yunis (1996) 225 regards these as key-words revealing Plato's indebtedness to contemporary oratory. The expressions εὐμενής/εὐνους, προσεκτικός, and εὐμαθής also appear in later rhetorical textbooks (ibid., note 23).

not convince everyone. This fact is tacitly acknowledged in the preamble, where the Athenian opposes what most people think to what he thinks the truth is (e.g. 727a 2–3, 728b 3), and describes only the ideal community as one where ‘everybody feels pleasure and pain at the same things, so that they all praise and blame with complete unanimity’ (739d 1–3). It may be for this reason that hortative parts are accompanied by more or less explicit threats (728b 2–c 8, 731b 3–d 5) of punishment. On the other hand, the lack of consensus explains why the Athenian attributes so much importance to the indoctrination of future citizens from their early childhood. Here, then, the citizens of the new *polis* have to undergo something similar to the process of Magnesian education, albeit just in a nutshell, in order to become capable of being persuaded by the legislator.

A look at the preambles to single parts of the Magnesian legal code¹²⁷ gives generally the same picture of the legislator’s persuasive efforts. While the Athenian gives some reason in every case, explaining why he thinks it necessary to regulate a certain aspect of life in a certain way, these reasons are far from being exhaustive or beyond debate in themselves. On several occasions, he even expresses his view that a certain way of regulation would be hard to impose, and enforcement cannot be regarded as realistic. In such cases, he suggests that a second-best way of regulation should be – hopefully only as a temporary substitute – adopted.¹²⁸ The particular preambles are also heavily based on the general preamble, presupposing its acceptance by the citizens. This acceptance, however, has its own limits, as one

¹²⁷ Yunis (1996) 227, notes 26–27 gives a list of the fully developed and the compressed preambles, adding some examples (ibid., note 28) of quasi-preambles, where the Athenian’s words are addressed to his interlocutors rather than the citizens of Magnesia. As the whole dialogue is to become a set text in Magnesian education (see below in the next section), however, this latter distinction does not have any practical relevance in terms of persuading the citizens.

¹²⁸ See e.g. 739b 8–740a 2 (general observations on what is ideal and realistic, and regulations concerning property), 773d 4–e 4 (rules of choosing the suitable spouse may be more efficiently implemented in the form of ἐπὶ δαί than in laws), 841c 8–842a 3 (two alternative regulations for extramarital sexual acts).

speech cannot be regarded as an adequate substitute for several years of continuous education.

Another approach to assessing the preparatory function of these preambles may be to say that what brings the audience in a ‘more favourable frame of mind’ is the very existence of the preambles rather than their specific contents. The Athenian speaks about the latter in rather general terms, mostly emphasising the persuasive function (see e.g. 720a 1–2, 721e 1–2).

In the context of the Athenian’s discussion, the most important parallel to the legislator who adds preambles to the laws is the physician who explains his choices of therapy to the patient rather than just giving prescriptions. The discussion of preambles starts, in fact, with this parallel (720a 2–e 5), which is recalled later (722e 8–723a 1). The doctor, or rather the assistant of the real doctor, who works exclusively by giving prescriptions, is compared to a tyrant, whereas the ‘free’ physician, who has got ‘systematic knowledge’ and has first-hand information from the patient, makes use of both persuasion and prescription.

The role of persuasion in medical treatment is mentioned also in the *Gorgias* by the eponymous character, who claims that rhetoric is superior to medicine in persuading about matters of health (456b 1–c 2). Socrates clarifies this statement in the following way: ‘Then the man who doesn’t know will be more persuasive than the man who knows among those who don’t know, when the rhetor is more persuasive than the doctor’ (459b 3–5). In the *Laws*, however, it is the real doctor who makes use of persuasion, and even though it is not said that he has got exact knowledge (the Athenian implicitly denies that for the slave-doctor¹²⁹) he certainly tries to learn about the case as much as he can, while instructing (διδάσκει) the

¹²⁹ 720c 5–6: προστάξας δ’ αὐτῷ τὰ δόξαντα ἐξ ἐμπειρίας, ὥς ἀκριβῶς εἰδῶς.

patient to the greatest possible extent in order to gain his consent (720d 2–e 2).

The rational or non-rational character of this kind of persuasion has been much debated in scholarship, as well as the differences between the discourses of the physician and the lawgiver (to this latter I shall come back presently). There are doubtless some features of the situation that are relevant for the question of rationality. The reasoning of the physician is not addressed to one of his colleagues. Nor is his instruction intended to educate physicians.¹³⁰ He has, then, to give his reasons in a form accessible for the patient. This may be regarded as the equivalent of instructive speech as described in the *Phaedrus*.¹³¹ What Plato emphasises, however, is the mere fact of persuasion.¹³² For a moderately reasonable patient, i.e. one who does not reject treatment altogether, who is aware that his knowledge of medicine cannot compete with that of the doctor, it may be enough to see that the doctor knows what he is doing on the one hand, and that it does matter for him whether the patient willingly accepts his prescriptions, on the other. Accordingly, the parallel seems to suggest that depending on the individual recipients, the presence of preambles is at least as important as their content.

3.1.3 Education and preambles

It may be objected, of course, that even a moderate reasonableness on the part of the citizens cannot be taken for granted. Plato himself occasionally expresses his scepticism as to the reasonableness of the average citizen (see e.g. 722b 6–7). This is an important objection, for even if persuasion by way of preambles is not intended to be completely rational, the addressees have to have at least some degree of

¹³⁰ See Yunis (1996) 222–223.

¹³¹ See Yunis (1996) 222–223.

¹³² See 720d 6–7: οὐ πρότερον ἐπέταξεν πρὶν ἂν πῃ συμπίσῃ.

affinity for it, or otherwise the persuasive efforts of the legislator would be completely hopeless.

Plato's answer to this problem is twofold. As for the 'initial set' of colonists, he suggests that they should be carefully filtered. In the case of Magnesia this means that not everyone should be admitted to join the newly founded *polis*.¹³³ It may still happen, however, that someone among the actual citizens defies persuasion. It is for these – hopefully exceptional¹³⁴ – cases that the possibility of constraint is retained in the code of laws. There are, then, two ways of dealing with cases of (potential or actual) non-obedience. More importantly, however, the legislator should aim at a citizenry that is open for persuasion, and the safest way to achieve that is education.¹³⁵

Concluding the discussion of the use of literature in education, the Athenian makes a somewhat unexpected suggestion. He recommends that the νομοφύλακες make the very discussion that is taking place between him and his two interlocutors the primary text used in education (811c 6–812a 3). This move has been interpreted in different ways by different scholars,¹³⁶ but its most important consequence for us here is that it relativises the difference between laws and preludes in terms of education, while leaving differences in terms of enforcement intact.¹³⁷

The appearance of the *Laws* among the reading assignments of pupils also detracts from the importance of the problem of individual persuasion. It is

¹³³ For a population already given, he suggests a more or less covert 'purgation', see 735b 1–736a 3.

¹³⁴ Cf. Yunis (1996) 216.

¹³⁵ At 722b 6–7, he seems to suggest that the main limit to persuasion is the addressees' lack of education.

¹³⁶ See e.g. Cohen (1993), Nightingale (1993), Bobonich (1991).

¹³⁷ Cf. Yunis (1996) 222 and Nightingale (1993) 286–287.

sometimes highlighted that preambles differ from the doctor's persuasive instruction in the sense that they cannot take the particular character of the individual citizen into account.¹³⁸ They are thus liable to the critique of written speeches formulated in the *Phaedrus*. Yet if the text of the *Laws* is to become a set text (and, at the same time, a measure for the qualification of teachers, see 811e 5–812a 1), which is presumably to be preserved in writing,¹³⁹ it is going to show all the features of written pieces of rhetoric described in the *Phaedrus*, with the exception that it is not left alone. Together with the other parts of the dialogue, the preambles are going to be 'made alive' by the teachers, who have to 'protect these speeches' as Socrates would put it (*Phdr.* 275e 3–5), and to make it speak to the pupils both individually (which is the ideal situation of teaching¹⁴⁰) and collectively.

3.2 The Second Best Constitution and (the Lack of) Judicial Oratory

The persuasiveness of legislation is discussed in the *Laws* from the perspective of both the education of the citizens to virtue and the efficiency of the Magnesian legal order. These two aspects are interrelated, as they both contribute to one another as well as to the proper functioning of the political community. Proper functioning, broadly speaking, means that laws are generally observed by the

¹³⁸ See e.g. Yunis (1996) 222, who compares the discourse of the doctor to that of the legislator and writes that 'as speeches addressed to the citizens en masse the legal preambles do not engage the auditors individually, and thus cannot instruct through the responsible, flexible style of reasoning possible in a dialogue'.

¹³⁹ At least Plato has written it. While the Athenian does not make this explicit and one might think of an oral tradition, writing down the text is what he recommends for 'unwritten compositions that show a family resemblance to our discussion' (811e 4–5). Also the transition from an address to the colonists to a general preamble to the law code (722d 1–723e 7) suggests that the speech of the legislator has to take a more permanent form.

¹⁴⁰ See *Phdr.* 276e 5–7, quoted above in sect. 2.3.

citizens, and that conflicts generally do not occur.¹⁴¹ This, in turn, means that there is much less place for the judicial application of law than in other (actual) cities.

An opposition between law-making and adjudication is suggested by the Athenian at the beginning of the dialogue, where he brings the example of a family quarrel. The best kind of judge, he argues, would be ‘the one who will take this single quarrelling family in hand and *reconcile* its members without killing any of them; by laying down regulations (νόμους) to guide them in the future, he will be able to ensure on friendly terms with each other’ (627e 4–628a 3). Regulations, to be sure, do not necessarily mean the absence of debates: it is the rules that make legal debates possible. Yet we also see that law-suits *qua* conflicts do not appear in a favourable light in the *Laws*. Moreover, the lawgiver has to discourage litigation before official courts,¹⁴² which also means that there remains less place for judicial rhetoric in the strict sense. It is not much of a surprise therefore that there are only three passages where the Athenian speaks of speeches before courts.

The first one is at the beginning of the part on the details of the judicial system and the procedures, and it simply states that ‘[f]irst, the prosecutor should deliver a single speech, then the defendant’ (855d 8–e 1), which has to be followed by questioning, then discussion and voting by the judges. The context in which this is said is the main rules of procedure for capital cases which are decided by the νομοφύλακες, where the Athenian professedly concentrates on the way of voting,

¹⁴¹ Cf. the medical parallel in *R.* 406c 3: πᾶσι τοῖς εὐνομουμένοις ἔργον τι ἑκάστῳ ἐν τῇ πόλει προστέτακται, ὃ ἀναγκαῖον ἐργάζεσθαι, καὶ οὐδενὶ σχολὴ διὰ βίου κάμνειν ἰατρευομένῳ. Cf. Schütrumpf (1994) 105, who discusses the influence of the *Laws* on the introduction of Aristotle’s *Rhetoric*, on which see the next chapter.

¹⁴² The first instance should be the litigants’ neighbours and friends, and those ‘who understand best the actions under dispute’ (766e 4–767a 1), i.e. a panel of arbitrators (whose award is binding, see 767c 2–4; διαίται at 766d 6 may refer to some kind of mediation in the modern sense). There are two kinds of court, a supreme court and several tribal ones, both of which serve as courts of appeal on the one hand (767a 1–4), and adjudicate private and public crimes on the other (767b 4–c 1). It is not clear whether the procedure for deciding cases of crimes against the *polis* (767e 9–768b 1) implies a further court: Saunders (1970) 244, note 22. The passages concerning private arbitration in Magnesia are collected in Roebuck (2001) 165–170.

leaving the ‘procedural details’ to the next generation of legislators (855d 1–4).

Thus, one can only speculate whether this limitation of speeches applies for the procedure to be followed in other cases. As there are further procedural rules laid down in different contexts, but the number and sequence of speeches are not mentioned any more, it seems probable that they do.¹⁴³

The second passage comes after such further procedural rules, those on evidence, and begins, by way of a prelude, with a swipe at judicial rhetoric, without naming it once:

[G]ranted justice is a blessing, can advocacy (τὸ συνδικεῖν) fail to be a blessing too? But valuable though they are, both these institutions have a bad name. There is a certain skill of immoral practice, grandly masquerading as a skill (τέχνη), which proceeds on the assumption that a technique (μηχανή) exists – itself, in fact – of conducting one’s own suits and pleading those of others, which can win the day regardless of the rights and wrongs of the individual case; and that this skill itself and the speeches composed with itself are available free – free, that is, to anyone offering a consideration in return. Now it is absolutely vital that this skill – if it really is a skill, and not just a knack born of casual trial and error (ἄτεχνός [...] ἐμπειρία καὶ τριβή) – should not be allowed to grow up in our state if we can prevent it. (937e 2–938a 5)

Rhetoric, to be sure, is not alone in being condemned here. The subsequent penal provisions show that it is not the teaching but the practice of judicial oratory that is to be punished under certain circumstances. The criminal behaviour consists in ‘trying to misrepresent to the judges where the course of justice lies, and to enter one plea after another in support either of his own or someone else’s case when equity would call a halt’, and the charge is one of κακοδικία or συνδικία κακή (938a 8–b 4). The reasons for committing that crime can, according to the law, be either φιλοχρηματία or φιλονικία,¹⁴⁴ and the punishments differ accordingly.¹⁴⁵

¹⁴³ As opposed to Athenian law, see e.g. MacDowell (1978) 249, who mentions the possibility (with reference to D. 19.213) that ‘in public cases, in which the speeches could be longer [...], only one speech on each side was allowed’. On differences between Athenian and Magnesian law, see Morrow (1960) 295–296 and Saunders (1970) 31–32, quoting Morrow.

¹⁴⁴ While the two kinds of action (false litigation: τὴν τῶν δικαίων δύναμιν [...] ἐπὶ τὰναντία τρέπειν, and excessive litigation: παρὰ καιρὸν πολυδικεῖν [...] ἢ καὶ συνδικεῖν, respectively) described in the law are connected simply with a καί, it seems that they can be done independently of one another and also that both of them are subject to prosecution. Thus, if one tries to use the judicial system for unjust purposes, it does not have to be repeated to qualify as *kako(syn)dikia*, and

Neither of these offences, however, has to do anything with rhetoric in itself. The connection is established by the Athenian in the *prooimion*, where he says that there exists something evil (τις κάκη) in the guise of a *technē*, which is to blame for the bad reputation of δίκη and τὸ συνδικεῖν (937e 2–5). The most important characteristics of this self-alleged *technē* are that (1) it claims to be able to win any legal case, (2) regardless of whether it is just or unjust, and that (3) both the *technē* and its products, i.e. the speeches, are given as a gift to those who give money as a gift in return. Of these characteristics, (1) and (2) recall what we find about rhetoric elsewhere in Plato’s dialogues,¹⁴⁶ while (3) refers to both the rhetoricians and those composing speeches for other people.¹⁴⁷

As we have seen, the criminal provisions that follow are not directed at teaching rhetoric or speech-writing. Rather, they aim at eliminating the demand for these pursuits. As the *prooimion* suggests, it is because of the rhetoricians’ propaganda of their expertise that people try to plead unjust cases before the courts on the one hand and to embark on endless litigation on the other. While the vices that make one inclined to these offences, φιλοχρηματία and φιλονικία, have to be treated at the level of the individual by way of punishment,¹⁴⁸ the *technē* that leads into temptation has to be eradicated by way of state intervention into the market. Once there is a risk of being liable to prosecution, people will consider it less

likewise, if one participates in lawsuits to an excess, he may be convicted even if he did not try to mislead the judges.

¹⁴⁵ Φιλοχρηματία is the worse case: foreigners are to be expelled and citizens to be put to death if found guilty of this figure, whereas in the case of φιλονικία the punishment is only ban from the courts on the first occasion, and capital punishment threatens repeat offenders only (938b 5–c 5).

¹⁴⁶ See e.g. Gorgias’ disclaimer in *Grg.* 457a 2–c 3. Also the Athenian’s remark at 938a 3 (‘if it really is a *technē*, and not just a knack born of casual trial and error’) echoes Socrates’ view as formulated in the *Gorgias* at 463b 4, and similarly *Phlb.* 55e 5, *Phdr.* 270b 5, cf. England (1921) vol. 2, 568 *ad loc.*

¹⁴⁷ The Athenian apparently speaks of both groups, not just the speech-writers (*pace* Saunders [1970] 487, note 5). On *logographia*, see note 87 above.

¹⁴⁸ Although there are some ways of dealing with them in general, i.e. raising the children in the spirit of modesty and without selfishness, see 729b 1–2, 731d 6–732b 4, and esp. 731a 2–3 (φιλονικεῖτω δὲ ἡμῖν πᾶς πρὸς ἀρετὴν ἀφθόνως).

rewarding to use the μηχανή of rhetoric, and consequently they will be less likely to pay either for instruction by the rhetoricians or for the ready-made speeches of the λογογράφοι. If these really intend to make money, as the Athenian insinuates, it will be a rational choice for them either to give up teaching/writing or to leave the *polis* and look for another place where they can continue their practice.

The third passage, like the first one, does not deal with rhetoric directly, but with an aspect of speaking before the court. Here, the Athenian challenges the tradition of making oaths in judicial proceedings. While it may well have been a suitable way of deciding cases in the world of Rhadamanthys, he argues, the fact that there are people who do not believe in gods (or have false beliefs about them) calls for amending the rules of procedure (948b 3–c 9). In order that these persons do not commit perjury due to their ignorance, the place for oaths should be strictly limited.

First, no oaths should be made by the parties when submitting their case to the court in writing (948d 2–7). Second, and this is more relevant for us here, among the participants of the trial it is only the judges who are to make an oath before making their judgement, as they cannot profit from making a false one (948e 4–5, 949a 3–5). The speakers should not be allowed to make oaths in order to make their speeches more credible (πιθανότητος χάριν), or to call down curses on themselves or their families, or to beg for clemency either in an indecent way or by ‘effeminate wailing’. The magistrates have to instruct such speakers ‘to return to the issue before the court’ (949 a 8–b 6). The right way of behaving for the litigants is ‘stating the lawful claims (τὸ δίκαιον) and listening to those of the other side with decency and decorum (μετ’ εὐφημίας)’ (949b 3–4).

Further passages deal with judicial rhetoric in an indirect way. At the beginning of their discussion of wine and drunkenness, the Athenian warns his

companions not to enter into a pointless debate where '[e]ach puts up enthusiastic witnesses to endorse its recommendations' (638d 3–4). The topic here is one of epideictic rhetoric, and the opposition of ψέγειν and ἐπαινεῖν confirms this impression, yet the use of witnesses shows an underlying concept of rhetoric that is based upon forensic practice – one that is reproached by the Athenian, who offers to show the right way (ὀρθὴν μέθοδον) of investigation about any similar matter (638e 4).

Discussing the imitative arts and the criteria of their evaluation, the Athenian opposes truth and false opinion in a rather Socratic manner:

[N]o imitation at all should be judged by reference to incorrect opinions about it or by the criterion of the pleasure it gives. This is particularly so in the case of representational equality. What is equal is equal and what is proportional is proportional, and this does not depend on anyone's opinion that it is so, nor does it cease to be true if someone is displeased at the fact. Accuracy, and nothing else whatsoever, is the only permissible criterion. (667e 10–668a 4)

While this passage is only relevant to rhetoric by way of analogy, it is still relevant. The terms used to describe the judgement are the same as in the case of forensic rhetoric: τὸ ἀληθές is opposed to δόξα (μὴ ἀληθής); ἡδονή and χαίρειν are referred to as factors completely irrelevant to the decision. Nevertheless, the Athenian's words suggest that opinions and pleasure may play an important role in everyday practice, unless one is aware of the true art of decision-making.¹⁴⁹ This recalls Socrates' negative opinion on rhetoric as formulated in the *Gorgias* (464c 5–d 3).¹⁵⁰

The third such passage is in the Athenian's characterisation of the first human generations after the deluge, who

were inevitably unskilled and ignorant of techniques (πρός [...] τέχνας) in general, and particularly of the military devices used on land and sea nowadays. They must also have been innocent of the techniques of warfare peculiar to city-life – generally called 'lawsuits' (δίκαι) and 'party-strife' (στάσεις) – in which men concoct every possible device (μεμηχανημέναι πάσας μηχανάς) to damage and hurt each other by word and deed (εἰς τὸ

¹⁴⁹ Cf. 638d 7–e 5. A certain sort of pleasure, however, may have an important function when serving the aim of persuading about the truth, see 667b 5–e 8.

¹⁵⁰ It will, in turn, find its echo in Aristotle's *Rhetoric*, see 1354b 6–11, 31–1355a 1.

κακουργεῖν τε ἀλλήλους καὶ ἀδικεῖν). (679d 4–e 2)

Here the terminology of verbal and physical wrongdoing (especially the *μηχαναί*) anticipates the express condemnation of rhetoric already discussed above. Also, the close association of *στάσεις* and *δίκαι* resembles Socrates' remark, again in the *Gorgias* (465c 5–8), on the relationship between sophistry and rhetoric. Read in the light of this latter passage, where Socrates says that it is sometimes hard to distinguish between sophists and rhetoricians, the Athenian may be understood to suggest that actual law-suits and civic strife are similarly connected. Such a reading seems, at any rate, to be coherent with the general purpose of the laws in Magnesia, i.e. to eliminate *στάσις* as well as law-suits (cf. 627d 8–628a 3).

While these passages show that, on the one hand, rhetoricians and speech-writers are not at all welcome in Magnesia, and, on the other, some of the laws are aimed at eliminating oratory from the courts, public addresses are not entirely absent from the *polis*. While discussing the purpose and desirable ways of military training, the Athenian says that '[o]n each field day they should distribute prizes and awards of merit, and compose speeches in commendation or reproof of each other according to the conduct of individuals not only in the contest but in daily life too' (829c 2–4). The subsequent provisions seem to suggest that this kind of epideictic oratory consists of hymns rather than speeches in prose. Nevertheless, as Plato considers the way a *logos* is performed less important than its content,¹⁵¹ one may still regard it as an instance of public speaking.

This kind of public 'speaking', however, clearly differs from rhetoric in the sense that it is not the technical skills of the composer that matter. Suitable candidates must be at least fifty years old and have distinguished themselves in the service of the state. While their works may be sung regardless of whether they are

¹⁵¹ Cf. *Grg.* 502c 5–d 3.

well-composed or not,¹⁵² other people are not allowed to compose or sing new hymns at all.¹⁵³ This suggests that the selection by the magistrates takes place on the basis of personal rather than artistic merits and it is not the quality of the *logos* that is evaluated but the reputation of the composer. This, to be sure, is a way of persuasion through character, but one that serves the aim of making the citizens better and can be therefore approved by the legislator.

3.3 Conclusion

The rejection of judicial rhetoric and oratory in the *Laws* is quite straightforward. What has caused much more controversy among interpreters of the dialogue is that new relationship between law and rhetoric, which seems to take place in the preambles.¹⁵⁴ The question, again, is how far the persuasive devices used by the legislator can be regarded as ‘rhetorical’.

Those who argue that there is a change in Plato’s attitude towards rhetoric point out the similarities between the ‘speeches’ attached to the laws and the ‘true rhetoric’ advocated by Socrates in the *Phaedrus*.¹⁵⁵ Their argument finds additional support in the fact that the Athenian recommends the dialogue as a set text to be used in educating proper citizens for a properly governed *polis*. Alongside these parallels, it is clear that persuasion is clearly separated in the dialogue from the

¹⁵² 829d 3–4: ὁδέσθω ποιήματα, ἐὰν καὶ μὴ μουσικὰ πεφύκη.

¹⁵³ It is interesting to note that Plato describes the licence to compose in terms of *παρρησία* (829d 6 and e 5).

¹⁵⁴ A notable exception is Saunders (2001, 88), who speaks of Plato’s ‘recognition—perhaps a grudging one—of the kind of reputable rhetoric envisaged by Aristotle’ in terms of judicial rhetoric, indicated by ‘Plato’s insistence on high educational standards in Magnesian jurymen’. However, Saunders’ own analysis of the moves by which Plato seeks to eliminate *epieikeia* from judicial decision-making seems rather to support my conclusion, according to which there is no place for rhetoric in Magnesian courts. On Aristotle’s understanding of rhetoric and legal argumentation in general (also in comparison with Plato’s ideas concerning law-making), see the next chapter, on Plato’s and Aristotle’s discussions of *epieikeia* see ch. III.

¹⁵⁵ E.g. Morrow (1953) 242, who is followed by Yunis (1996) 211–212. Cf. also Yunis (2011) 242 *ad Phdr.* 278d.

‘false rhetoric’ that was condemned in the *Gorgias*, substituted in the *Phaedrus*, and expelled, by means direct and indirect, from the city of the Magnesians.

Yet we have seen that the *technē* advocated in the *Phaedrus* is, arguably, not rhetoric but something else that is intended to replace it. We have also seen, however, that in the *Statesman* rhetoric appears in a ‘purified’ form, that is, serving exclusively the aims of the wise ruler in terms of convincing the citizens of the necessity of observing the laws. This conception of rhetoric seems to follow the line of thought started in the *Gorgias*, albeit in a way different from that of the *Phaedrus*.¹⁵⁶

The project of the *Phaedrus* is that of transforming rhetoric into dialectic, thus making it a form of teaching. In the *Statesman*, it is made explicit that rhetoric does not teach, and also the subject matter of persuasion (*to dikaion*) and its audience (the multitude) signal the return to the definition offered by Gorgias.

There are, however, two important differences from ‘ordinary’ rhetoric, which are implicit in the *Statesman* but clearly elaborated on in the *Laws*. The first one is the situation in which persuasion takes place. In the *Gorgias*, the audience of the orator is about to act as a public body of legal or political decisionmaking, as they have to decide (in a lawsuit) about the just/unjust character of an action that has already taken place¹⁵⁷ or a course of action proposed by a politician. In the *Laws*, however, it is individuals making decisions about their own (future) actions who need to be persuaded by the legislator. The second difference, in turn, shows a change into the opposite direction, i.e. a decision being moved from the individual to the community, as it is not exclusively one’s own decision that leads to one’s

¹⁵⁶ Despite the parallels between the wise ruler of the *Statesman* (295b 10–296a 3) and the wise author of *logoi* in the *Phaedrus* (275d 4–276e 5), who both use written text as a second-best choice.

¹⁵⁷ Or, if the above time horizon sounds excessively Aristotelian, then they are to decide whether a punishment ought or ought not to be imposed on someone.

delivery of public addresses.

While speeches are not entirely absent from Magnesia, we have seen that access to the possibility of speaking is strictly limited. This is even more so in the case of the preambles: their author is nobody else but the legislator. What is expressed in these preambles, even if in a form that makes it palatable for the respective addressees of the laws, is the fundamental purpose of the regulation, and these purposes are there to stay. Single parts of the legal code may be amended if inevitable, albeit the conditions become rather strict after a ‘trial period’ (cf. 772a 6–d 4), but it is only allowed to make them conform to their original purposes. And if we regard the whole of the dialogue as part of the ‘preamble’ in a broader sense, we should not forget that its text cannot be changed, either, and its speakers form an even more narrow circle than those possibly participating in legislation. In the political community of Magnesia, then, there is a further quality added to the *Phaedrus*’ criteria of suitable speeches. More than just corresponding to truth, they also have to be allowed, i.e. their authors have to be authorised by the leaders of the *polis*.

Persuasion, to be sure, plays an important role in the *Laws*, as it did in the *Phaedrus*. It is, however, hard to argue that this is something new in comparison with e.g. the *Gorgias*. On the other hand, if we are eager to discover some kind of a development in Plato’s attitude to persuasion, then it could be characterised with an increasingly detailed qualification, one that makes the respectable way of persuasion more remote from rhetoric. With the final step made in the *Laws*, the monopolisation of public speaking, there is no point in calling it rhetoric any more, and Plato tacitly draws the consequences: he does not use the term.¹⁵⁸

¹⁵⁸ Only the word ῥήτωρ occurs in three passages (723d 3: ῥήτορι, 876b 4 and 885d 6: ῥητόρων), referring consistently to persons delivering public addresses.

Chapter II: Aristotle's View of Judicial Rhetoric

Introduction

This chapter seeks to reconstruct Aristotle's views concerning the value and function of judicial rhetoric as described in his *Rhetoric*. This has to be done in comparison with Plato's views discussed in the previous chapter on the one hand, and within the framework of Aristotle's general appraisal of rhetoric on the other. Before turning to the text of the *Rhetoric*, however, I shall briefly examine the possible links between Aristotle's rhetorical studies and Plato's Academy.

Ancient biographies¹⁵⁹ tell us that Aristotle started his career in philosophy as one of Plato's pupils: according to Diogenes Laertius, he was 'Plato's most genuine disciple' (γεννησιώτατος τῶν Πλάτωνος μαθητῶν, 5.1.1). He later left the Academy, for reasons not entirely clear.¹⁶⁰ Even though there seems to have been no opposition between Plato and Aristotle while the former was alive,¹⁶¹ the criticism we find in Aristotle's works of some of Plato's views¹⁶² still raises the question of how far his views about rhetoric were influenced by Platonic doctrine. This question is important for us here because it seems that those passages of the *Rhetoric* that deal with judicial rhetoric have been interpreted by modern scholarship from a Platonic perspective, bringing Aristotle in line with Plato's contempt for that branch of rhetoric.

¹⁵⁹ Ancient authorities on Aristotle's life are collected in Düring (1957).

¹⁶⁰ See most recently the overview of Anagnostopoulos (2009b), esp. 6–7. Whether or not he did in fact leave while Plato was still alive is uncertain. Jaeger (1948) 11 seems to be convinced that Aristotle only left after Plato's death. His departure is often linked to the fact that he did not follow Plato as the head of the Academy. Düring (1957) 459 mentions the possibility of an earlier departure because of anti-Macedonian sentiments in Athens.

¹⁶¹ See DL 5.1.2, quoting the perhaps not authentic saying of Plato: Ἀριστοτέλης ἡμᾶς ἀπελάκτισε, καθαπερὶ τὰ πωλάρια γεννηθέντα τὴν μητέρα.

¹⁶² See e.g. Schütrumpf (1994) 101.

It seems to be generally accepted that Aristotle started to teach rhetoric at the Academy, that is, in the 350s.¹⁶³ In connection with that, it has been argued that one of his earliest writings,¹⁶⁴ the now lost *Gryllus*¹⁶⁵ was composed entirely in the vein of Plato's harsh criticism of contemporary rhetoric¹⁶⁶ and perhaps directed against Isocrates and his school.¹⁶⁷

The first of these views, i.e. that Aristotle taught rhetoric at the Academy, seems to be based on hardly more than a series of conjectures. The sources claimed to suggest that Aristotle started to lecture on rhetoric '[s]ometime in the 350s, while still a member of the Academy'¹⁶⁸ do not, in fact, say anything to that effect. While other sources do not give any information about the relative dates,¹⁶⁹ Quintilian writes that Aristotle started his afternoon classes 'eoque [sc. Isocrate] iam seniore (octavum enim et nonagesimum implevit annum)' (*Inst. or.* 3.1.14). Also Diogenes Laertius mentions the beginning of Aristotle's rhetorical activity after the launching of his own school (5.1.2), and introduces the anecdote in which Aristotle

¹⁶³ See e.g. Thillet (1957) 354, Chroust (1964) 58.

¹⁶⁴ For recent overviews of Aristotle's early writings on rhetoric (the *Gryllus*, the *Synagōgē technōn*, and the *Theodectea*), see Erickson (1976) and Rapp (2002) vol. 1, 224–235.

¹⁶⁵ It appears in the catalogues of his works: DL 5.1.22, Vita Hesychii, Ptolemy el-Garib. Cf. Moraux (1951), quoted by Chroust (1965) 576.

¹⁶⁶ See e.g. Jaeger (1948) 29–30, Chroust (1965) 579–581.

¹⁶⁷ See e.g. Thillet (1957) 353–354, Chroust (1965) 583.

¹⁶⁸ Kennedy (1991) 5, and 304, note 4, following Chroust (1964).

¹⁶⁹ In addition to Diogenes Laertius and Quintilian, the sources quoted by Chroust (1964) 58–62 are Phld. *Rh.* 2.50–51 (Sudhaus), Cic. *de or.* 3.35.141, *orat.* 14.46, *Tusc.* 1.4.7, Syrian. *in Hermog.* 4.297–298 (Walz) and 2.5.21 (Rabe). Philodemus quotes the anecdote mentioned above, adding that Aristotle taught rhetoric in the afternoon, then criticises Aristotle's attitude as it appears from his words. In his summary of Philodemus, Chroust (1964) 58 simply supplements the text: 'Aristotle taught rhetoric in the afternoon (in the Academy)', without justifying it. Cicero only writes about Aristotle's conversion to rhetoric (in the *De or.* and the *Tusc.*), quoting the anecdote (in the *De or.*), and about Aristotle's use of the *thesis* in the rhetorical exercises of his pupils (in the *Or.*), but in neither does he give any hint as to Aristotle's teaching of rhetoric at the Academy. Syrianus mentions the afternoon lectures, the anecdote, and relates Aristotle's views on the similarity between rhetoric and dialectics, but without mentioning the Academy.

starts to talk about rhetoric because ‘it would be shameful to remain silent’¹⁷⁰ with the words ἐπειδὴ δὲ πλείους ἐγένοντο ἤδη (5.1.3).

That the *Gryllus* followed Plato’s *Gorgias* in arguing that rhetoric is not a *technē* seems to be attested by Quintilian.¹⁷¹ Yet the conclusion that it was due to the *Gryllus* that ‘Aristotle was permitted—perhaps even urged—to offer a course of lectures on rhetoric in the Academy’¹⁷² does not seem compelling. By writing the dialogue, Aristotle may have proved that he is capable of teaching, perhaps to come up with new ideas of his own, and also that he was reliable in the sense that he was not hostile to Plato’s views.¹⁷³ What one fails to see, however, is how a work in which it is argued that rhetoric is not a *technē* could lead to Aristotle’s appointment to teach rhetoric. This problem could be argued away by pointing out that Aristotle perhaps distinguished between good and bad rhetoric, and that his invective was directed against the latter and its exponents,¹⁷⁴ but such a claim seems to be rather difficult to substantiate. The only explicit reference to the content of the *Gryllus*, i.e. the one by Quintilian, does not make such a distinction, nor, as I have tried to show in the previous chapter,¹⁷⁵ does Plato in the *Gorgias*.

¹⁷⁰ In Diogenes Laertius, Aristotle finishes the sentence with Ξενοκράτην δ’ ἔαν λέγειν. The other sources have Isocrates instead of Xenocrates, which may then link Aristotle’s teaching of rhetoric to the general anti-Isocratean sentiment at the Academy, cf. Chroust (1964) 70, Kennedy (2007) 4–5.

¹⁷¹ Quint. *inst. or.* 2.17.14: ‘Aristoteles, ut solet, quaerendi gratia quaedam suptilitatis suae argumenta excogitavit in Gryllo: sed idem et de arte rhetorica tris libros scripsit, et in eorum primo non artem solum eam fatetur, sed ei particulam civilitatis sicut dialectices adsignat.’ Whether or not some of the rather Platonic-sounding arguments mentioned by Quintilian (2.17.16–29) appeared in the *Gryllus* (as suggested by Thillet (1957) 353–354, Solmsen (1929) 201 ff., cf. Chroust (1965) 581, 586) is unclear.

¹⁷² Chroust (1965) 591, cf. Chroust (1964) 71.

¹⁷³ Although it may well be the case that in the dialogue, as in the *Gorgias*, arguments for the opposite view were formulated as well. The phrase ‘quaerendi gratia’ in Quintilian’s testimony leaves open the possibility, too, that Platonic arguments were not put forth by Aristotle as his own: see Lossau (1974) 13ff. The context in which Quintilian mentions Aristotle’s early work suggests, however, that there was a change between the views formulated in the *Gryllus* and those of the *Rhetoric*, cf. Rapp (2002) vol. 1, 234–235.

¹⁷⁴ As e.g. Chroust (1965) 588–591 tries to do.

¹⁷⁵ See ch. I, sect. 1.4.

Another text to which the beginnings of rhetorical studies, and hence of Aristotle's teaching, at the Academy are often linked is Plato's *Phaedrus*. Since Socrates in the dialogue advocates a new kind of rhetoric, with an alleged swipe at Isocrates at the end, it has been argued that Plato intended the *Phaedrus* to advertise the launching of his school.¹⁷⁶

Yet what makes the *Phaedrus* important for us here is not so much the information it contains about the conflict between the Academy and Isocrates, but the parallels it has with Aristotle's *Rhetoric*. As the two texts have been preserved and can be compared, there is much less need for speculation on the basis of circumstantial evidence than in the case of the *Gryllus*.

The characteristic features of Plato's 'new rhetoric' in terms of doctrine may be identified as the rejection of the technicalities discussed by contemporary rhetoricians (*Phdr.* 266d 7–267d 4) on the one hand, and as an increased interest in the study of the soul (270b 4–271c 4) on the other. Both of these seem to have their echoes in the *Rhetoric*.

As for the doctrine of rhetoric, Plato focuses on its preoccupation with the parts of the speech,¹⁷⁷ rhetorical devices of argumentation,¹⁷⁸ and matters of style.¹⁷⁹ His Socrates mentions Theodorus and Euenus, Tisias and Gorgias, Prodicus and Hippias, Polus, Licymnius, Protagoras and Thrasymachus among the rhetoricians.

Aristotle repeatedly criticises, albeit without mentioning any names, the authors of textbooks in the first chapter of his *Rhetoric* for dealing with 'matters

¹⁷⁶ See McAdon (1994a), and in the previous chapter, sect. 2.1.

¹⁷⁷ Such as προοίμιον, διήγησις, μαρτυρία, τεκμήρια, εικότα, πίστωσης, επιπίστωσης, ἔλεγχος, ἐπεξέλεγχος, ὑποδήλωσις, παρεπαίνος, παραψόγος, and ἐπάνοδος.

¹⁷⁸ That is, πρὸ τῶν ἀληθῶν τὰ εἰκότα εἶδον ὡς τιμητέα μᾶλλον, τὰ τε αὖ σμικρὰ μεγάλα καὶ τὰ μεγάλα σμικρὰ φαίνεσθαι ποιοῦσιν διὰ ῥώμην λόγου, καινὰ τε ἀρχαίως τὰ τ' ἐναντία καινῶς, συντομίαν τε λόγων καὶ ἄπειρα μήκη περὶ πάντων ἀνηῦρον (267a 6–b 2).

¹⁷⁹ Techniques related to the length of the speech, διπλασιολογία, γνωμολογία, εἰκονολογία, and ὀρθοέπεια, then βραχυλογία, ἐλεινολογία, and δεινώσις, which Socrates calls εἶδη λόγων (272a 6).

external to the subject’ (1354a 15–16, b 17), that is, with irrational persuasion.¹⁸⁰ It is also within this context that he mentions the προοίμιον and the διήγησις, for those parts of the speech mostly serve the aim of ‘putting the judge in a certain frame of mind’ (1354b 19–20),¹⁸¹ and the exclusive interest of these authors in judicial rhetoric, for it is here that attempts at irrational persuasion may go unnoticed and eventually succeed (1354b 27–1355a 1).¹⁸²

Both Plato’s and Aristotle’s criticism suggests that contemporary rhetoricians¹⁸³ actually miss the point when they discuss things that are, at best, marginal to the essence of rhetoric. But Plato then has Socrates start to speak about the knowledge of the soul, whereas Aristotle says that proof, and the enthymemes in particular, make ‘the “body” of persuasion’ (1354a 13–15). Thus, while Aristotle may be following one of Plato’s didactic moves here, it seems clear that what he says is not a repetition of Platonic doctrine, but reflects a different approach to rhetoric.

In Book 2 of the *Rhetoric*, however, Aristotle turns to the characteristics of human soul which are relevant for persuasion. In chapters 2 to 11, he describes a series of emotions (*pathē*), while chapters 12 to 17 deal with different types of character (*ēthē*). It is particularly the latter that seems to respond to Socrates’ requirement that

he who is to be a rhetorician must know the various forms of soul. Now they are so and so many and of such and such kinds, wherefore men also are of different kinds: these we must classify. Then there are also various classes of speeches, to one of which every speech

¹⁸⁰ See below at sect. 1.1.1.

¹⁸¹ Cf. 1415a 34–b 6 and 1419b 10–12, cf. Kennedy (2007) 33, note 16.

¹⁸² See below at sect. 2.1.

¹⁸³ Kennedy (2007) 31, note 10 speculates that Aristotle may be thinking ‘primarily of the handbooks of the mid-fourth century’. While it is certainly true that Aristotle shows knowledge of authors later than those mentioned by Plato in the *Phaedrus*, he may as well be speaking of textbooks in general, using the particle *vūn* only to introduce a new statement. His *Synagōgē technōn*, which Kennedy, too, mentions (*ibid.*, 297–298) may have provided adequate basis for claims about rhetorical doctrine not limited to his contemporaries in a narrow sense.

belongs. [...] The student of rhetoric must, accordingly, acquire a proper knowledge of these classes and then be able to follow them. (*Phdr.* 271d 1–e 1)

What is problematic for the understanding of these descriptions is that Aristotle does not state their exact purpose. Therefore, one may speculate whether they are to be read as information about the audience, and are intended to help the speaker tailor the speech to the *ēthos* of the respective addressees, in the spirit of Plato's Socrates, or they are also about the expectations of the audience, thus helping the speaker to construct his own *ēthos* so as to correspond to those expectations, or they contain more general observations and hence should serve as the basis for enthymematic arguments about the persons characterised in the speech.¹⁸⁴ The best answer seems to be an inclusive one: there is no reason why the usefulness of the discussion of *pathos* and *ēthos* should be limited to any of the above possibilities,¹⁸⁵ or rather, there seems to be no reason why Aristotle should have wanted to limit its scope of application.¹⁸⁶

If this inclusive understanding of the chapters on *ēthos* and *pathos* is right, then we see, once again, a Platonic echo in Aristotle that is nothing less but also nothing more than an echo. While one may be perfectly justified in thinking that these problems were highlighted by Plato to his disciples, including Aristotle, and perhaps to think that it was due to Plato's influence that Aristotle elaborated on them, the above examples show that Platonic doctrine cannot be regarded as a strict limit of interpretation when reconstructing Aristotle's views in the sense that

¹⁸⁴ Cf. Kennedy (2007) 148.

¹⁸⁵ The concepts of the 'story in the trial' and the 'story of the trial' developed by Bernard Jackson (1992) may be illuminative here. Jackson convincingly argues that the same narrative structures are at work in stories told by the participants of a judicial trial and in their perception of it.

¹⁸⁶ Grimaldi (1988) 2 writes, bringing together the first two possibilities, that 'the actual purpose of chapters 12–17 with its study of the major character types is to show the speaker how his *ēthos* must attend and adjust to the *ēthos* of varied types of auditor if he is to address them successfully'; this observation is cited by Kennedy (2007) 148, who then adds that '[t]his is similar to what Socrates urges in the *Phaedrus* but more pragmatic and open to possible abuse'.

one should assume Aristotle's adherence to it, without developing or departing from its conceptions.

In this chapter, I am going to examine two problems related to the introductory chapter of the *Rhetoric*. It seems to me that in these cases, and the first one in particular, Plato's views had too strong an influence on the interpreters of the *Rhetoric*, and it may be for this reason that they attributed an overly restrictive view about the possibility and value of judicial rhetoric to Aristotle. But before turning to those problems, it seems to be in order here to briefly explain why I think Aristotle's approach to rhetoric differs from that of Plato.

In the previous chapter, we have seen how Plato's encounters with rhetoric have led to a gradual change of approach. This change, however, does not mean that he ever came to approve of either the practice of rhetoric he experienced or the circumstances under which persuasion took place. In the *Politicus* he explains why rhetoric, i.e. persuasion, is important in a political community, but in the *Laws* he makes clear that the venues of persuasion should be different from those in contemporary Athens. To take the most striking example, there does exist a sort of legal rhetoric in Magnesia, but it is by no means judicial rhetoric. The primary occasion for persuasion in terms of lawfulness is not at the judicial trial: rather, it should precede the action that could come before court. It is for this reason that the Athenian speaker recommends the use of preambles in legislation, while banning rhetoricians who teach techniques of litigation from the *polis*.

In the *Rhetoric*, Aristotle does not try to remove the links between rhetoric, which he regards as a *technē*, and the actual practice of persuasion, while keeping the two apart at a conceptual level. Rhetoric, as a *technē*, looks at the practice in order to 'observe the cause why some succeed by habit and others accidentally' (1354a 9–10). This makes rhetoric 'an ability (*dynamis*), in each case, to see the

available means of persuasion' (1355b 25–26). By this move, Aristotle distances himself from the views Plato advocates in the *Gorgias* (i.e. that rhetoric is not a *technē* because it has no subject¹⁸⁷ and if it was one then it should have an inherent moral value) and the *Phaedrus* (i.e. that if rhetoric wants to be a *technē* then it has to become dialectics in the Platonic sense), and at the same time he makes clear that rhetoric does not in itself produce persuasion.

This way, moral considerations become external to rhetoric,¹⁸⁸ and the primary criterion of assessing other authors' contributions to the *technē* is whether their approach is a sound one in terms of methodology. At this point, however, Aristotle makes an important qualification. There are certain means of persuasion that are central to rhetoric, while others are only marginal. The reason for that seems to be that rhetoric has to be done methodically, and not everything that produces persuasion can be explained in such a way. Therefore, irrational manipulation on the one hand, and already existing evidence (the *pisteis atechnoi*) on the other are not in the focus, albeit for different reasons. The central field of rhetoric is the examination of the *pisteis entechnoi*, that is, proof that produces persuasion.

It may seem puzzling that Aristotle regards *ēthos* and *pathos* as *pisteis entechnoi*, while condemning emotional manipulation. One possible answer to that problem is that taking emotions and character into account may qualify as proof in so far as it can be rationalised and is relevant for the question under consideration. For instance, feeling anger against someone who has been shown to be guilty of a certain crime is a normal reaction from the part of the audience, and the speaker can and should count with that reaction. What should not be done is provoking a

¹⁸⁷ Cf. Rapp (2002) vol. 1, 212–213.

¹⁸⁸ See Rapp (2002) vol. 1, 376–377, and (2009) 592–593.

certain emotion in order to prevent the audience from properly considering the given question, and not only because it is morally wrong (cf. 1354a 25–26) but because it would lead to a mere semblance of persuasion. The *pisteis atechnoi*, on the other hand, are only marginal in the sense that they prove certain facts by themselves, without any further proof. How they can contribute to persuasion is, however, a matter of interest for rhetoric and this is why they have a place in Aristotle's discussion.

The focus of this chapter is on two problems concerning Aristotle's view of judicial rhetoric. The first one is the limits of legal argumentation before a court of justice. Accordingly, in the first half of the chapter I am going to deal with the interpretation of a key passage from the first chapter of Book I (1354a 26–30). I shall argue, against what seems to be the *communis opinio*, that Aristotle does not want to confine the speakers' arguments in a judicial procedure to the question of facts. Secondly, I turn to the relative value of judicial rhetoric as compared to the other branches of rhetoric, in particular to deliberative rhetoric. Here my contention will be that the passage in which Aristotle describes deliberative speaking as superior to the judicial branch (1354b 22–29) concentrates on the role of proof in different settings and does not suggest any attempt at the marginalisation of judicial rhetoric.

1 The Possibility of Forensic Oratory

In the first chapter of his *Rhetoric*,¹⁸⁹ Aristotle discusses the aim and the possibility of describing rhetoric as a *technē*.¹⁹⁰ Having stated that it is possible to deal with

¹⁸⁹ The English version quoted is that of Kennedy (2007), with modifications tacitly applied.

¹⁹⁰ See Grimaldi (1980) 4–6 *ad* 1354a 11 (1), Rapp (2002) vol. 2, 27–28 *ad* 1345a 6–11 (1).

persuasion methodically (ὁδῶ),¹⁹¹ he criticises the textbooks previously published on the topic for failing to do so (1354a 11–1355a 20). His remarks point out two kinds of shortcomings in the earlier authors. On the one hand, they limited the scope of their works to the ways of arousing emotions in their audience,¹⁹² while on the other hand they discussed the judicial branch of rhetoric only, this being the domain where such non-rational means of persuasion can be deployed with the most chance of success.

Even within judicial discourse, appeals to emotions are beside the point (ἐξω τοῦ πράγματος). The possibility to succeed with their help is due only to the factual and legal circumstances of the forensic debate. The judges are accessible for this sort of persuasion and whereas ‘in many places the law prohibits speaking outside the subject,’ (1355 a 1–2, cf. 1354a 21–23) in other courts this is apparently not the case.

Aristotle then seems to draw a sharp line to demarcate the roles of the parties and the judges of a legal debate. In Kennedy’s translation the passage sounds as follows:

[I]t is clear that the opponents have no function except to show (δείξαι τὸ πρᾶγμα) that something is or is not true or has happened or has not happened; whether it is important or trivial or just or unjust, in so far as the lawmaker has not provided a definition, the juror should somehow decide (γινώσκειν) himself and not learn (μανθάνειν) from the opponents.¹⁹³ (1354a 26–30)

It may seem difficult indeed to reconcile this latter passage with the overall content of the work, and this contradiction is sometimes pointed out in

¹⁹¹ Both Ross (1959) and Kassel (1976) follow the emendation suggested by Bywater (1903) 248. See Kassel’s arguments for, and Grimaldi’s against it: Kassel (1971) 117–118, Grimaldi (1980) 3–4 *ad* 1354a 8.

¹⁹² Cf. Dow (2007).

¹⁹³ The above quotation preserves the exact wording of Kennedy’s translation as it reflects his position on the interpretation of the passage.

interpretations of the *Rhetoric*.¹⁹⁴ After all, Aristotle *does* discuss arguments concerning whether something ‘is important or trivial or just or unjust.’ Later on, in the third chapter, speaking of the respective ends (τέλος) of the three branches of rhetoric, he explicitly states that ‘for those speaking in the law courts [the end] is the just and unjust, and they make other considerations incidental to these’ (1358b 25–27). He then explains that by adding that ‘a judicial speaker [might not deny] that he has done something or done harm, but he would never agree that he has committed injustice; for [if he admitted that,] there would be no need of a trial’ (31–33).

Moreover, Aristotle’s claim does not sound realistic, to say the very least.¹⁹⁵ For we know that in practice judicial discourse, and Greek forensic oratory was no exception, is rarely limited to the determination of facts. And the determination of the facts themselves is hardly innocent of (controversial) interpretation: ‘that something is or is not true or has happened or has not happened,’ in a legal sense, presupposes the definition of that ‘something,’ which is one of the possible points of controversy.¹⁹⁶

To make things even worse, the passage that follows (1354a 31–1354b 16) opposes the responsibilities of the lawmaker and the judge. Highlighting some

¹⁹⁴ See e.g. Rapp (2002) vol. 2, 48 *ad* 1354a 27–28, McAdon (2004b), Kennedy (2007) 29.

¹⁹⁵ On the ‘idealism’ of Aristotle’s *Rhetoric* see e.g. Sprute (1994) 119–121, Schütrumpf (1994) 113–115.

¹⁹⁶ This is rightly pointed out by Rapp (2002) vol. 2, 48 *ad* 1354a 27–28, who seeks to resolve the contradiction with Chapter 3 (1358b 31–33) by explaining that ‘Dass eine Person eine andere umgeschlagen hat, mag vielleicht nicht einmal kontrovers sein, ob mit dieser Tat aber die gesetzlich bestimmten Kriterien für das Unrecht der Körperverletzung erfüllt sind, darauf kommt es den streitenden Parteien primär an und *darüber* dürfen sie auch im Sinne der vorliegenden Regelung von I 1 streiten – was ihnen nicht erlaubt sein soll, ist hingegen, dass sie über den Nachweis des Tatbestands hinaus die Erheblichkeit oder den Unrechtscharakter der schon als ein bestimmtes Unrecht subsumierten Tat (z. B. als Körperverletzung, Vertragsbruch usw.) etwa durch den Vergleich mit anderen Taten, durch Relativierung der gesetzlichen Bestimmungen usw. erörtern.’ See further 1373b 38–1374a 17 on the possibility of challenging the *epigramma* of a certain act committed. Questions related to definition are discussed in the following chapters.

structural differences between the situations in which laws and judgements are passed, Aristotle concludes that

in other matters [...] the judge should have authority to decide as little as possible; but it is necessary to leave to the judges the question of whether something has happened or has not happened, will or will not be, is or is not the case; for the lawmaker cannot foresee these things. (1354b 11–16)

Here, the inevitable limits of the lawmaker's knowledge provide the reason for empowering the judge to make a decision concerning the facts of the case, even if the court is less suitable a place for careful deliberation than a session of the *nomothetai*.¹⁹⁷

Yet if it is left to the judges to decide about the facts, what remains for the parties of the debate? Or, conversely, if it is the task of the opponents to prove the facts, then it is indeed very little what the judges 'have authority to decide' between the compelling proofs delivered by the parties and the legal rules defining 'everything as exactly as possible.'

But let us return to the passage at 1354a 26–30. I shall briefly summarise here Eckart Schütrumpf's interpretation of Aristotle's remarks on the role of the speakers and the judge,¹⁹⁸ as they formulate with much clarity what seems to be the generally accepted opinion in Aristotelian scholarship.¹⁹⁹

Schütrumpf rightly notices that like Plato, Aristotle offers a political (rather than a rhetorical) way to keep the harmful effects of judicial rhetoric at a minimum. Whereas 'Plato's Cretan city would not know judicial rhetoric, which was to be banned',²⁰⁰ Aristotle wants laws to introduce '[r]estrictions [...] on the

¹⁹⁷ Cf. 1354a 33–b 11.

¹⁹⁸ Schütrumpf (1994). In his paper, Schütrumpf highlights the Platonic background of Aristotle's discussion, focusing on the parallels that link the *Rhetoric* to Plato's *Laws*. He draws the conclusion that, unlike in the case of several other works, Aristotle remains entirely within the confines of Plato's views. On the Platonic parallels, see section 1.1.3 below.

¹⁹⁹ Cf. e.g. Kennedy (2007) 29, Hurri (2013).

²⁰⁰ Schütrumpf (1994) 105.

subject about which the litigating parties may say anything: They may only make statements of facts [...]. This ruling goes to the heart of the legal process by removing the litigants' opportunity to state their view about a truly controversial matter.²⁰¹

Setting such radical limits to the speakers' arguments before the court, Schütrumpf argues, is paired with a limitation of the judges' scope of deliberation by way of providing clear regulations.²⁰² He then summarises Aristotle's argument in the following way:

[T]he litigants should not be allowed to give their own interpretations of what justice is; this is reserved to the judges (6, 1354a28ff.). But it is clearly preferable that laws cover every issue so that even judges don't have any discretion when making their decision (a31ff.). For this reason the very area about which *litigants* are allowed to *speak*, the factual circumstances of the incident, is as well the matter on which the *judges* will have authority to *decide* (8, 1354b12ff.)—both should be precluded from developing views on what is just and what is unjust.²⁰³

Denying the speakers the possibility to discuss the qualities (i.e. importance and justice) in addition to the facts is, as mentioned above, in clear contradiction with what Aristotle does in the rest of the *Rhetoric*.²⁰⁴ Schütrumpf explains that with the different functions of the introduction and the further chapters. The former 'states the purpose of rhetoric and what limitations well-ordered states

²⁰¹ Schütrumpf (1994) 106. He then quotes several passages to show that 'Aristotle acknowledges elsewhere that disputing parties "agree about the facts, but dispute which side has acted justly."' Cf. *ibid.* note 44, where he lists the following passages from Aristotle: *EN* 1135b 31, cf. b 27, *Rhet.* 1358b 30ff., 1373b 38, 1374a 9ff., 1417b 29f., cf. 1416a 11, *Pol.* 1300b 26, 1280a 18ff., *EE* 1221b 23. These passages (with the exception of *Pol.* 1280a 18ff, which is not relevant) do not suggest, however, that facts could not be controversial. Aristotle's point is, rather, that *even if* someone admits the facts, he may still argue that the act committed was not unjust (this point will be discussed in the following chapters). This notwithstanding, banning the arguments about justice from the legal discourse would be a serious restriction if that would be what Aristotle had in mind.

²⁰² Here again, he points out a similarity as well as a difference between Plato and Aristotle, who 'both agree that the bulk of matters should be settled by the lawgiver and only a very small portion should be left to the judges. However, this guideline, which is limited in Plato to the authority of imposing a certain *penalty*, is used by Aristotle in a much broader sense, namely to state *in general* for how many issues there should be *laws*': Schütrumpf (1994) 109.

²⁰³ Schütrumpf (1994) 107, note 51, emphasis in the original.

²⁰⁴ On the relationship between facts and 'qualities', see below at sect. 1.3.

impose [...]. Once this is done, Aristotle can move on to rhetoric as it is practised in states that do not enjoy a good order.’²⁰⁵

This interpretation rests on two assumptions, namely, that (1) 1354a 26–30 is basically about the distribution of roles within a court trial,²⁰⁶ and (2) that the task of the orators is opposed to that of the judge. It is on the basis of these assumptions that interpreters seek to answer the question of ‘who is entitled to what’ and come to the conclusion that according to 1354a 26–30, the orators may address questions of fact but not questions of justice and importance, these latter being reserved for the judge. 1354a 31–1354b 16 would then qualify this, making it clear that it is preferable that judges decide about the facts only, questions of justice and importance being prejudged, as it were, by the legislator.

In what follows I shall examine the above passages from a new perspective, focusing on the context in which the remarks of 1354a 26–1354b 16 are said. In other words, while previous interpretations mainly concentrate on the separation of ‘something is or is not true or has happened or has not happened’ and ‘whether it is important or unimportant, just or unjust’, my analysis starts with looking at the importance of ‘showing the facts’.

This section falls into three parts, each of them focusing on elements of Aristotle’s first remark at 1354a 26–30. First, the expression δεῖξαι τὸ πρᾶγμα (1354a 27–28) is discussed, in order to see what the ‘facts of the case’ would mean and how it links the passage to the criticism of other textbooks, which is the main topic of Aristotle’s introduction. Second, I turn to the relationship of the judge and the legislator, described at 1354a 28–30 (as εἰ δὲ μέγα ἢ μικρόν, ἢ δίκαιον ἢ ἄδικον,

²⁰⁵ Schütrumpf (1994) 115. See also Hellwig (1973) 107–108 and Rapp (2002) vol. 2, 48 *ad* 1354a 27–28 for the contrast between an ideal way of regulating forensic discourse and the actual circumstances of oratory.

²⁰⁶ Cf. also Dufour’s sub-headings in his translation (1932) 72.

ὅσα μὴ ὁ νομοθέτης διώρικεν, αὐτὸν δὴ πού τὸν δικαστὴν δεῖ γινώσκειν) and then further explained at 1354a 31–1354b 16. Finally, I shall have a look at the importance of the warning καὶ οὐ μανθάνειν παρὰ τῶν ἀμφισβητούντων (1354a 30–31), focusing on the nature of legal arguments described by Aristotle in Book I on the one hand, and the opposition of γινώσκειν and μανθάνειν on the other.

1.1 ‘Showing the Facts’

Let us first have a look at the verb Aristotle uses to describe the litigants’ activity. What they do with the πρᾶγμα is δεῖξαι, they ‘show’ them to the judge. In a strikingly similar passage, at 1354b 30–31, Aristotle says that in deliberative speeches, ‘nothing is needed except to show (ἀποδεῖξαι) that things are as the speaker says’. Grimaldi in his commentary rightly notes that δεῖξαι and ἀποδεῖξαι are best understood in these cases ‘in a non-technical sense’, i.e. as a non-formalised explanation or demonstration.²⁰⁷ Facts may not need formal proof in the sense of a complete logical syllogism,²⁰⁸ but they always have to be ‘shown’ or explained to the judge, as they serve as the basis of the final decision on lawfulness.²⁰⁹ The participants of the debate certainly need to offer a narrative of what happened²¹⁰ in order that the judge may formally adopt one of the competing stories, and sufficient backing to justify the choice.

²⁰⁷ Grimaldi (1980) 12 *ad loc.*

²⁰⁸ One may think of the *pisteis atechnoi*, which may prove a certain statement without any additional support (whereas their validity or reliability may still be challenged, and amplification in terms of their importance may be in order).

²⁰⁹ Also because the judges do not have direct access to the most important part of the facts as they cannot have experienced the act under dispute: cf. Hellwig (1973) 124–125.

²¹⁰ See also Eden (1986) 72.

1.1.1 Relevant and irrelevant arguments

It is worth comparing also the object of ἀποδειῖξαι at 1354b 30–31 with that of δεῖξαι at 1354a 27–28. According to the former, what deliberative speakers have to show their audience is ὅτι οὕτως ἔχει ὥς φησιν ὁ συμβουλευών, without further specification. That is, the orator has to prove his claims and do nothing else, i.e. he should not go into matters irrelevant for the case. In judicial cases, Aristotle adds at 1354b 31–33, this may not be enough, as given the different nature of judicial situations (cf. 1354b 29–30 and 33–1355a 1), it is both useful and necessary to influence the audience (ἀναλαβεῖν τὸν ἀκροατήν) by means other than proofs relevant to the legal case.²¹¹

This parallel suggests that πρᾶγμα responds to the phrase ἔξω τοῦ πράγματος, used several times throughout the introduction of Book I,²¹² and thus ties Aristotle’s remark about the distribution of roles to the general topic of the discussion, i.e. the actual subject of rhetoric. This impression seems to be confirmed if we look at the structure of his criticism of other authors.

Writing about things that are ἔξω τοῦ πράγματος is, as mentioned above, the first thing for Aristotle to criticise. After making this point at 1354a 15–16, he explains that ‘slander and pity and anger and such emotions of the mind do not relate to the case (οὐ περὶ τοῦ πράγματος ἐστίν) but are appeals to the judge’ (1354a 16–18). This is then repeated with reference to the regulation of judicial oratory: in well-governed cities it is prohibited to speak ἔξω τοῦ πράγματος, for one should not manipulate the judges’ emotions (1354a 18–26).

Having discussed the way judicial decisions are made, Aristotle links the excursus to his main argument by saying that

²¹¹ See however Grimaldi (1980) 18 *ad loc.*

²¹² See Grimaldi (1980) 9–10 *ad* 1354a 15.

if this is so, it is clear that matters external to the subject (τὰ ἔξω τοῦ πράγματος) are described as an art by those who define other things: for example, why it is necessary to have the introduction or the narration and each of the other parts; for [in treating those matters] they concern themselves only with how they may put the judge in a certain frame of mind. (1354b 16–20)

He then goes on to show how his two points of criticism, i.e. focusing on judicial rhetoric and discussing matters irrelevant of the case, are connected. Other authors, Aristotle argues, focus on judicial rhetoric rather than political oratory, for in the case of the latter it is less worthwhile to speak about matters ἔξω τοῦ πράγματος (1354b 26–28). The situation in which judicial decisions are made is more suitable for bringing irrelevant arguments. It is for this reason that in many cities laws prohibit speaking ἔξω τοῦ πράγματος (1354b 33–1355a 3). Finally, the statement according to which ‘that other writers describe as an art things outside the subject [of a speech] (τὰ ἔξω τοῦ πράγματος) and that they have rather too much inclined towards judicial oratory (τὸ δικολογεῖν) is clear’ (1355a 19–20) signals the end of Aristotle’s discussion of previous textbooks.

Thus, Aristotle seems to distinguish between two groups of things that can be possibly said by the orators before the court: something is either relevant to the case and thus qualifies as (rational) proof, or irrelevant and may serve only to (irrationally) manipulate the judges. Understood in light of the above, the task of the orator (i.e. δεῖξαι τὸ πρᾶγμα) is opposed not only, and not even primarily, to that of the judge but rather to speaking ἔξω τοῦ πράγματος.

The question of what is and what is not relevant for the case is, of course, rather difficult to answer. While Aristotle here tends to reduce it to the opposition of proof and manipulation, equating the former with enthymemes and examples (cf. 1355a 3–7 and 1356a 35–b 8)²¹³ and classifying everything else as the latter, he

²¹³ The exclusiveness of proof at the end of the latter passage (1356b 6–8: πάντες δὲ τὰς πίστεις ποιοῦνται διὰ τοῦ δεικνύναι ἢ παραδείγματα λέγοντες ἢ ἐνθυμήματα, καὶ παρὰ ταῦτα οὐδέν) may be taken as a parallel to the limitation of the means the orator is allowed to use (1354a 26–28: ἔτι δὲ

seems to be aware that there is also another, substantive rather than formal distinction. It may be argued, on the one hand, that emotions can be relevant for the case²¹⁴ and, on the other hand, that also enthymemes and examples can serve the aim of illegitimately influencing the judges.²¹⁵ It is from such a substantive perspective that the meaning of *πρᾶγμα* becomes important.

1.1.2 *Πρᾶγμα* in the Rhetoric and the Orators

At 1354a 28, *πρᾶγμα*, as the object of *δειξαι*, basically means ‘what is proven’, or more precisely ‘what the proof refers to’. It is sometimes considered to be limited to ‘the factual circumstances of the case’, as opposed to the question of lawfulness²¹⁶ but it should be noted that, on the one hand, such a limitation is not conveyed by the word itself, but rather the subsequent separation of facts and qualities. On the other hand, the scope of the ‘factual issues’ themselves needs some clarification.

Πρᾶγμα may be reasonably taken to cover the factual issues (*ἔστιν ἢ οὐκ ἔστιν, ἢ γέγονεν ἢ οὐ γέγονεν*) as well as the evaluative aspects (*μέγα ἢ μικρόν* and *δίκαιον ἢ ἀδίκον*), the task of the orators being to prove the former. Aristotle’s use of *πρᾶγμα* in the first book of the *Rhetoric* confirms this impression.

The first occurrences of the word in the introduction of the *Rhetoric*²¹⁷ have been discussed above. They are all related to the problem of relevance,²¹⁸ i.e. something being *peri* or *exō tou pragmatos*.

φανερὸν ὅτι τοῦ μὲν ἀμφισβητοῦντος οὐδὲν ἔστιν ἔξω τοῦ δειξαι τὸ πρᾶγμα).

²¹⁴ Cf. Dow (2007).

²¹⁵ E.g. in the case of a *diabolē*. On the relativity of what counts as *diabolē*, see Carey (2004) 4–6.

²¹⁶ See Kennedy’s translation of 1354a 16–18, where he renders *οὐ περὶ τοῦ πράγματός* as ‘do not relate to fact’: Kennedy (2007) 31. See also Hurri (2013), with some objections formulated in Kőnczöl (2013).

²¹⁷ 1354a 16, 18, 23, b 17, 27, 1355a 2, 19.

²¹⁸ In two of the above cases (1354b 17 and 1355a 19), Aristotle seems to play on the ambiguity of the expression: in so far as the textbook authors teach to speak *exō tou pragmatos*, they are themselves

The last passage in the first chapter speaks about *hypokeimena pragmata*. Here, Aristotle explains that among the *technai* it is only rhetoric and dialectics that deal with both sides of an argument, but this does not mean that both of the possible positions would be equally easy to argue for. The difference is made by the *pragmata*, as ‘true and better ones are by nature always more productive of good syllogisms and, in a word, more persuasive’ (1355a 36–38). It is clear, at any rate, that *pragmata* cannot be the facts in themselves, but statements about them, which can be true or false, right or wrong, and which then make the case advocated by the speaker. In the fourth chapter, the same expression appears in a somewhat different context. There again, the difference between rhetoric and dialectics on the one hand, and the other *technai* on the other is scrutinised, but this time Aristotle argues that it is somewhat misleading to describe the former as ‘forms of knowledge of certain subjects,’²¹⁹ rather than only of speech’ (1359b 14–16). These ‘subjects’, then, are not particular ones but general truths which can be the proper subjects of *technai*. The difference between better and worse *pragmata* is then taken up again in the seventh chapter, among the examples of the topic of magnitude applied in deliberative speeches. If the *epistēmai* of something are better (*kallious ē spoudaioterai*), so the argument goes, then also the *pragmata* have to be better, for the subjects follow the knowledge (1364b 7–10). Another occurrence of *ta pragmata* in the same list (1364b 18) is bracketed (rightly, as it seems) by Ross.²²⁰ Yet independently of the correctness of the emendation, *pragma* here would mean whatever can be chosen (cf. 1363a 12–15). *Pragma* appears in a similarly general sense in an anonymous quotation of chapter 11 (*pan gar anankaion pragmatōn aniaron*

speaking outside the point, as it is only proof that is relevant for rhetoric as a *technē*.

²¹⁹ This rendering of *tōn hypokeimenōn pragmatōn* follows Grimaldi (1980) 30 ad 1355a 36 (2).

²²⁰ See, however, Grimaldi (1980) 163 ad loc. (1).

ephy, 1370a 11), where the topics of pleasure (to be used in judicial oratory) are illustrated. Only slightly more specific is another item on the same list, where Aristotle says that ‘whatever comes at intervals is sweet, persons as well as *pragmata*’ (1371a 29–30).

A specific human action is suggested by *pragma* in the first item of the next list, that of the topics about those committing unlawful acts. Those people, Aristotle says, do wrong when they think that ‘the *pragma* can be done and they can do it’ (1372a 5–6). A similar meaning is attributed to *pragma* by some interpreters in the discussion of the use of *pisteis atechnoi*. Starting with the statutes (*nomoi*), Aristotle explains how one should argue if the written law is contrary to the *pragma* (1375a 28), then lists the arguments to be deployed if the law is favourable for the *pragma* (b 16).²²¹ The problem with the narrow interpretation is that it is difficult to see how a law could be *enantios* to a specific action. It might mean that the statute is not relevant for the case, but Aristotle is clearly not speaking here of *prima facie* irrelevance, as he offers general arguments against the (strict) use of written law. I cannot see any more convincing interpretation of *pragma* than that it means ‘our case’, and it also seems to correspond to what Aristotle identifies as the purpose of rhetoric.²²² One of the arguments against a statute can be that the situation in which it was made (*ta [...] pragmata eph’ hois etethē*) does not exist any more (1375b 13–14), *pragmata* here

²²¹ Kennedy (2007) 103–104 consistently renders *pragma* as ‘facts’ in ‘if the written law is contrary to the facts’ and ‘if [...] the written law is in accordance with the facts’. The position of Grimaldi is more puzzling. Commenting on the first phrase, he claims that *pragma* is ‘that which took place, the actual fact, the specific action at issue. It is not to be translated, as it frequently is, “our case,” “our view of the case” if these phrases imply that we should be ready to twist the facts to fit the best chance for success’: Grimaldi (1980) 319 *ad* 1375a 28 (2). On the second occasion, however, he suggests that *pros to pragma* means “in accord with”, i.e., “favors the case”: *ibid.* 324 *ad* 1375b 16 (2). See also Carey (1996) 36, note 15: ‘The question is not whether the law is relevant to the subject under dispute (for throughout his discussion of *nomos* Aristotle clearly envisages the citation of law by one side or the other) but which side the law favours.’

²²² 1355b 25–26. See Kennedy (2007) 102.

referring to a specific state of affairs but not to the particular action to be adjudicated.

The last two occurrences of *pragma* in Book 1 are in the discussion of arguments related to testimonies (*martyriai*) and *pragma* is opposed to *ethos* in both cases (1376a 25 and 27). Thus, there are two kinds of witness testimonies in this respect: those directly related to the issue,²²³ and those about the character of the plaintiff or the defendant.

To sum up the above observations, there is only one case in Book 1 where *πρᾶγμα* certainly refers to a specific action.²²⁴ More often, it describes ‘things’ in the most general sense, and sometimes it refers to a state of affairs as the object of arguments, knowledge, or even as the context of a certain regulation. On the other hand, it is never contrasted explicitly with evaluation²²⁵ but often refers to one’s case, i.e. what has to be supported with proof. To that, one might add that the cognate noun *πραγματεία*, too, is used in the *Rhetoric* in the sense of representing a certain position in a debate or the treatment of a question.

There are several examples for the same usage in the orators, which show that forensic speakers likewise used *πρᾶγμα* when referring to the issue under dispute. In D. 21.110–111, for instance, the speaker has *πρᾶγμα* refer to various things: in a former case, it was the charge (*πρᾶγμα*) itself that has shown his innocence, then it is the ἐν Εὐβοίᾳ πράγματα that the speaker was charged of on

²²³ Cf. Grimaldi (1980) 332 *ad* 1376a 25 (1), with reference to 1354a 26–28.

²²⁴ But cf. also 1385a 2, where *pragmata* (‘conditions’) are distinguished from actions (ἔργα).

²²⁵ Unlike τὰ ὑπάρχοντα: see e.g. 1396a 4–b 10, where τὰ ὑπάρχοντα consistently refers to what is given (and forms the basis of evaluation), while *to pragma* refers to (the issue of) evaluation itself. See esp. 1396a 25–b 8: καὶ γὰρ συμβουλευόμενον ὑπὲρ αὐτοῦ, τὰ ὑπάρχοντα ἢ δοκοῦντα ὑπάρχειν ληπτέον [...]. ὁμοίως δὲ τούτοις καὶ περὶ πράγματος ὁπουοῦν, οἷον περὶ δικαιοσύνης, εἰ ἀγαθὸν ἢ μὴ ἀγαθόν, ἐκ τῶν ὑπαρχόντων τῇ δικαιοσύνῃ καὶ τῷ ἀγαθῷ [...] φανερόν ὅτι ἀναγκαῖον, ὥσπερ ἐν τοῖς Τοπικοῖς, πρῶτον περὶ ἑκάστον ἔχειν ἐξελεγμένα περὶ τῶν ἐνδεχομένων καὶ τῶν ἐπικαιροτάτων, περὶ δὲ τῶν ἐξ ὑπογίου γιγνομένων ζητεῖν τὸν αὐτὸν τρόπον, ἀποβλέποντα μὴ εἰς ἀόριστα ἀλλ’ εἰς τὰ ὑπάρχοντα περὶ ὧν ὁ λόγος, καὶ περιγράφοντα ὅ τι πλεῖστα καὶ ἐγγύτατα τοῦ πράγματος.

another occasion, then it is the present procedure (τὸ πρᾶγμα) that has proven to be dangerous for him, because he may well have to pay for affairs he was not involved in (δοῦναι [sc. δίκην] πραγμάτων ὧν οὐδὲν ἐμοὶ προσήκεν ἐκινδύνεον). In 4.9, the audience is called to look at the πρᾶγμα, i.e. the height of Philippus' shamelessness (proven by his recent behaviour). In Lys. 12.3, the speaker claims that he never participated in a lawsuit before (οὐτ' ἐμαυτοῦ πρόποτε οὔτε ἀλλότρια πράγματα πράξας).

Yet the general sense of πρᾶγμα cannot explain away the opposition of ἔστιν ἢ οὐκ ἔστιν, ἢ γέγονεν ἢ οὐ γέγονεν on the one hand and μέγα ἢ μικρόν and δίκαιον ἢ ἄδικον on the other. Aristotle is quite clear that proof has to be furnished for the former, while the judge has to decide himself about the latter. I have argued so far that δεῖξαι τὸ πρᾶγμα suggests that the litigants have to argue with proofs rather than manipulate the judges' emotions, and that proof has to be focused on the *pragma* rather than on irrelevant matters. Let us now turn to the verbs describing what the judge should and should not do.

1.1.3 What the judges should do: Platonic parallels

Speaking of the judges' activity, Aristotle uses the two verbs μανθάνειν and γινώσκειν. To that, Schütrumpf brings *Laws* 659a 4ff. as a parallel. There, the Athenian explains the duties of the judges at artists' competitions. The judges, he says, need 'not only a discerning taste, but courage too': they should be able to decide against the opinion of the audience. The judge should not listen to the audience (οὔτε γὰρ παρὰ θεάτρου δεῖ τόν γε ἀληθῆ κριτὴν κρίνειν μανθάνοντα), nor should his decision (γινώσκοντα) be influenced by fear and unmanliness (*Lg.* 659a 4–6). 'The truth is that he sits in judgement as a teacher of the audience,

rather than as its pupil (οὐ γὰρ μαθητῆς ἀλλὰ διδάσκαλος)' (659b 2–3). While Plato does not suggest that these requirements would apply for a judicial situation, Schütrumpf is certainly right in that the wording of the passage justifies a closer comparison. It seems, however, that Plato's view of the desirable assessment of artistic competitions does not say anything about either the participants' or the audience's licence to give their opinion. On the contrary, it is the task of the judge to disregard these opinions, and decide according to the real qualities of the presentations. In the context of Aristotle's *Rhetoric*, a closer parallel would be the speakers' use of emotional manipulation, which the judge has to resist.

There is, however, more explicit advice concerning such manipulation in the *Laws*. In a passage already mentioned in the previous chapter,²²⁶ the Athenian explains that oaths cannot fulfil the same function as they did in the age of Rhadamanthys and consequently, mutual oaths should be abolished by the lawgiver (948d 1–8),²²⁷ except for cases that arise between aliens (949b 6–c 5). Moreover, every kind of activity that is targeted at the emotions of the judges rather than the legal case should be banned from the courts:

the presiding officials at a trial are not to give a man a hearing if he tries to win belief by swearing oaths (ὀμνύντι), or imprecating himself or his family (ἐπαρώμενον ἑαυτῷ καὶ γένει), or by grovelling appeals to clemency (ικετεΐαις χρώμενον ἀσχήμοσιν), or effeminate wailing (οἴκτοις γυναικείοις), but only if he states (διδάσκοντα) his lawful claims (τὸ δίκαιον), and listens (μανθάνοντα) to those of the other side, with decency and decorum. Otherwise, the officials will ignore his remarks as irrelevant (ἔξω τοῦ λόγου) and instruct him to return to the issue before the court (ἐπανάγειν εἰς τὸν περὶ τοῦ πράγματος ἀεὶ λόγον). (949a 8–b 6)

The opposition of διδάσκοντα and μανθάνοντα might be interpreted to appear here in a sense much closer to what Schütrumpf urges to see in the *Rhetoric*. If Plato has the two participles refer to the mere acts of speaking and listening, then this

²²⁶ See ch. 1, sect. 3.2 above.

²²⁷ It is interesting to note that the Athenian justifies this suggestion with a reference to what people actually think, i.e. something about which he said earlier (in Book 10) that the lawmaker has to correct it.

passage may be regarded as a source for Aristotle's formulation, at least if he uses *μανθάνειν* in the same broad sense ('listening to'), as Schütrumpf thinks he does. There are, however, some arguments that speak for a more specific sense for *μανθάνειν* in both in the case of *Lg.* 949a and *Rhet.* 1354a, i.e. that of 'accepting the opinion of others'.

As for Plato's advice concerning the courts, the first thing to note is that the object of *διδάσκοντα* and *μανθάνοντα* is *τὸ δίκαιον*. This latter is translated as 'lawful claims' by Saunders, and a claim can be said and heard, but hardly taught or learned. *Τὸ δίκαιον*, however, may well have a much broader sense even in the case of a court trial. In Plato's *Magnesia*, even the court can be a place where people can learn something about 'what is just' (*τὸ δίκαιον*) in general from one another. But also focusing on the given situation, 'what is just' in the particular case is something that can, and should, be taught and learned by citizens of *Magnesia*, i.e. explained and demonstrated on the one hand, and accepted on consideration on the other. While Plato certainly does not want to have any rhetoric before the courts, he seems to allow the parties of a trial to address the question of what is *τὸ δίκαιον*, which cannot be understood to refer exclusively to the facts of the case. Even Plato, then, may be understood to be lenient towards legal argumentation from the parties, although he does not want to leave much space for judicial deliberation. But our concern here is the meaning of *διδάσκοντα* and *μανθάνοντα*, and it seems clear that *τὸ δίκαιον* is not just 'said' and 'heard', but rather 'explained' and 'learned' at a trial.

Summing up the above, we may say that in 659a and 949a, *μανθάνειν*, *διδάσκειν* and *γινώσκειν* refer to the process of deliberating or making a decision. In so far, they support a reading of *Rhet.* 1354a that does not limit *μανθάνειν* to 'hearing' and does not therefore exclude the possibility of legal argumentation on

the part of the speakers. The relevance of *Lg.* 949a for the interpretation of Aristotle's remark is, however, limited, as Plato writes that the litigants should διδάσκειν and μανθάνειν what is τὸ δίκαιον, whereas Aristotle speaks about the judge and asserts that he should *not* 'learn from the litigants' matters of justice and importance.

1.2 The Judge and the Legislator

But if Aristotle is speaking about relevant and irrelevant arguments, good and bad rhetoric, rather than the distribution of roles, then what should we make of the long passage (1354a 31–1354b 16) where he clearly discusses the distribution of powers between the judge and the legislator? The passage was perceived as 'a parenthetical remark of Aristotle to students of political philosophy' by George Kennedy.²²⁸ Eckart Schütrumpf, as we have seen, points out a more organic link between 1354a 26–30 and 1354a 31–1354b 16, claiming that 'the very area about which *litigants* are allowed to *speak*, the factual circumstances of the incident, is as well the matter on which the *judges* will have authority to *decide*'.²²⁹ According to Schütrumpf, then, in Aristotle's ideal court the litigants make statements about what actually happened, while it is the task of the judges to make a legally binding decision about the same question, i.e., to 'establish the facts'. The final decision concerning the question of justice, however, is practically made by the laws, as it is the law-maker, rather than the judge, who should attach legal qualifications to particular facts.

While one can hardly disagree with Schütrumpf about his description of judicial 'fact-finding', i.e. that the judges *decide* about matters of fact, it seems that

²²⁸ Kennedy (2007) 32.

²²⁹ Schütrumpf (1994) 107, note 51, quoted above at the beginning of this section.

his reconstruction of Aristotle's conception of judicial decision needs some qualification. Schütrumpf is certainly right in saying that according to Aristotle, the judge as well as the litigants 'should be precluded from developing views on what is just and what is unjust',²³⁰ but only insofar as these views are about what is *generally* just or unjust,²³¹ and only in the sense that they should not question the order of values established by the legislator.

It has to be noted that Aristotle does not say that no decision concerning justice should be left for the judges but only that their power should be confined as narrowly as possible by the legislator, who ought to make provisions for every possible case. This is first indicated by the remark ὅσα μὴ ὁ νομοθέτης διώρικεν (1354a 29–30), then made explicit a couple of lines later, where Aristotle says that '[i]t is highly appropriate for well-enacted laws to define everything as far as possible and for as little as possible to be left to the judges' (31–33). It is then repeated at the end of the excursus: '[i]n other matters [sc. justice and importance], then, as we have been saying, the judge should have the narrowest sphere of authority possible' (1354b 11–13). Now this may be taken to suggest that ideally the lawmaker should regulate everything, and in cases where there is a legal rule there is no place for any decision on the part of the judge (and, accordingly, no place for argumentation on the part of the litigants). This would, then, confine the judicial authority to deciding the question of 'whether something happened or not ...', except for cases where there is no legal rule. Such an interpretation, however, overlooks the contrast made by Aristotle between rules, or as he puts it, 'the lawmaker's decisions' (τοῦ νομοθέτου κρίσις, 5) and judgements (including the

²³⁰ Schütrumpf (1994) 107, note 51.

²³¹ See also Hellwig (1973) 107, who speaks about the denial of non-necessary decisions, as value and importance, to the judge. She is certainly right, however, in emphasising that the passage 1354a 27–28 is to be interpreted within the context of the methods of proof: *ibid.* 108.

resolutions of the assembly). While rules are ‘not about a particular case (οὐ κατὰ μέρος) but about what lies in the future and in general (περὶ μελλόντων τε καὶ καθόλου)’ (5–6), judgements are about ‘present and specific cases (περὶ παρόντων καὶ ἀφωρισμένων)’ (7–8). The context in which this contrast is made is one where Aristotle explains why he prefers the lawmaker’s decisions to those of the judges and assemblymen, yet the opposition of καθόλου and ἀφωρισμένων also suggests that even where there is a relevant rule, the particular case requires a decision,²³² in terms of justice as well as the facts.²³³ I shall come back to the relationship between questions of fact and questions of law presently, but first I would like to have a closer look at the connection between 1354a 26–30 and 31–b 16.

The interpretation of Schütrumpf suggests that 1354a 31–1354b 16 is basically elaborating on the phrase ὅσα μὴ ὁ νομοθέτης διώρικεν (1354a 29–30), completing as it were the distribution of roles between the litigants, the judge, and the legislator, by pointing out the reasons why legislation should cover every possible situation in advance. This is certainly right, and the whole passage may well reflect Platonic influence. Schütrumpf quotes as a parallel *Lg.* 875d 5–876d 6,²³⁴ where the Athenian explains the principles of regulating judicial discretion. According to Plato, it is necessary that judges decide about ‘whether the crime did in fact take place, or not’ (875e 3–5). Moreover, ‘it is hardly feasible to produce laws oneself to cover every case’, and therefore ‘one can scarcely leave the courts no discretion at all about the fine or punishment that ought to be imposed’ (875e 5–876a 2). What is more interesting for us here, however, is that Plato has the Athenian also explain why judicial discretion has to be confined:

²³² Cf. Grimaldi (1980) 13 *ad* 1354b 5.

²³³ Cf. Schütrumpf (1994) 109.

²³⁴ Schütrumpf (1994) 106, 108–109.

[S]ometimes we find in a state that the courts are useless, dumb things; the individual judges keep their opinions a mystery known only to themselves and give their decisions by secret ballot. It's even more serious when so far from keeping silent when they hear a case they make a tremendous disturbance as though they were in a theatre, and hurl shouts of applause or disapproval at the speaker on either side in turn. (876a 9–b 5)

The image of a theatre and the expression of approval or disapproval links, again, Plato's discussion to Aristotle's appraisal of the judges' capability to decide cases. According to Aristotle, not only individual interests, but also pleasure and pain influence the judgements (ἐπισκοτεῖν τῇ κρίσει τὸ ἴδιον ἢ δὲ ἢ λυπηρόν, 1354b 11). This is repeated in the comparison of judicial and deliberative situations, where he says that the judges do not decide about their own affairs, rather 'the judgement is about other people's business and the judges, considering the matter in relation to their own affairs and listening according to their liking (πρὸς χάριν ἀκροώμενοι), lend themselves to [the needs of] the litigants but do not judge' (1354b 33–1355a 1). Yet here again, the relevance of the Platonic parallel is limited as Aristotle just mentions an ideal regulation, whereas his main concern is the scope of rhetoric. For him, as for Plato, the disposition of the judges is a serious problem. But in the context of the *Rhetoric*, it is a problem because it makes the judges liable to being influenced by speaking ἔξω τοῦ πράγματος (cf. 1354b 31–33). Thus, 1354a 31–b 16 does more than just explain the desirable limitation of judicial discretion: it also shows why irrationally manipulating the judges means a real danger for the proper functioning of the legal system. In other words, the passage furnishes additional backing to Aristotle's starting claim that in rhetoric there is no place for anything else than proof.

1.3 Facts to Law: The Nature of 'Legal' Arguments

But what remains for the orator? Does Aristotle allow speakers to address questions of lawfulness, justice and importance before the court or not? The above

insights suggest that he does, while the final decision is in the hands of the judge. Let us now turn to Aristotle's description of the corresponding arguments to see whether they are compatible with such an approach.

Introducing the discussion of arguments typically used in forensic oratory, Aristotle says that 'one should grasp three things: first, for what, and how many, purposes people do wrong; second, how these persons are [mentally] disposed; third, what kind of persons they wrong and what these persons are like' (1368b 3–5). After a brief explanation of the concept of wrongdoing (i.e. 'doing harm willingly in contravention to the law'), he goes on to

define what people long for and what they are avoiding when they try to do wrong; for it is clear that the prosecutor should consider, as they apply to the opponents, the number and nature of the things that all desire when they do wrong to their neighbours, and the defendant should consider what and how many of these do not apply. (28–32)

After the perpetrators and victims of wrongdoing, Aristotle turns to just and unjust actions. Drawing on his earlier definition of wrongdoing, he offers a threefold classification, according to the law, the victim, and the wrongdoer, respectively. Yet as (written) laws are distinguished according to whether they protect public or private interests, he can summarise his classification as follows: 'all accusations are either in regard to [wrongs done to] the community or to the individual, the accused having acted either in ignorance and involuntarily or voluntarily and knowingly and in the latter case either with deliberate choice or through emotion.' (1373b 33–36)

The problem of intention is in the focus of the subsequent discussion of definition,²³⁵ too, as Aristotle states that whether or not a legal term (τὸ ἐπίγραμμα) applies for a certain act depends on the presence or absence of deliberate choice (προαίρεσις). By giving definitions, he claims, 'if we wish to show that some legal

²³⁵ This point will be further elaborated in the next chapter.

term applies or not, we will be able to make clear what is a just verdict (ἐμφανίζειν τὸ δίκαιον)’ (1374a 8–9).

How a just verdict can be obtained through the proper use of definition is also shown by the example Aristotle gives for the functioning of fairness (τὸ ἐπιεικές). Justice has to go beyond written law in the cases where the lawmaker has omitted something from the text of the law: in the example, ‘how long and what sort of iron has to be used to constitute “wounding”’ (32–33). If the lawmaker fails to provide a definition of ‘iron’, even a man attacking another with an iron ring on his hand can be declared guilty of a more serious crime than what he actually commits.

As the last part of the πίστεις ἔντεχνοι characteristic of judicial rhetoric, arguments related to the magnitude of wrongs are briefly discussed (1374b 24–1375a 21). Here Aristotle gives a list of aspects of an act committed, which can be highlighted by the orator in order to show that a certain ἀδίκημα is indeed a serious one.

Now, the question is how these topics work: how they aim at convincing the judge of the just/unjust character or the importance of an act. According to Aristotle’s definition, to qualify as an ἀδίκημα an act has to be harmful, intentional, and against the law. We might expect, then, that the problematic passage in Chapter 1 confines the orators’ task to show whether the act was actually committed, while the questions of harmfulness, intention and – obviously – lawfulness would constitute the judges’ domain. Such an expectation, however, is clearly refuted by a closer examination of the topics.

The topics of judicial rhetoric are divided in three groups, the first one dealing with wrongdoers and their victims, the second one with justice and injustice, and the third one with magnitude. According to this classification, the

first group would correspond to the question of committing a wrongful act intentionally, and the topics listed there are also possible sources for arguments from probability.²³⁶ It goes without saying that the second group contains topics relevant for the normative aspect of justice/injustice, and the third is explicitly intended to furnish arguments regarding magnitude and importance.

There are, however, two features which may suggest that this clear-cut separation of arguments can be accounted for by didactic reasons rather than any theoretical consideration. One is the presence of references to intention throughout the discussion, and the other is the internal structure of the arguments.

The problem of intention arises by virtue of Aristotle's definition of wrongdoing. Consequently, the answer to the question referring to 'the facts', i.e. 'what happened?' has to take the form of an assertion like 'X has intentionally done something which was harmful to someone else (or the city as a whole) and contrary to a specific law.' If X has done nothing that was harmful or contrary to the law, or if he has done something but not intentionally, then – at least from the perspective of the judge – nothing has happened. This is not to say, of course, that intention cannot be separated analytically from the action. There are some reasons, to which I shall come back presently, to think that the lack of intention needs to be addressed under the heading of justice/injustice as well. Yet the fact remains that the first group of topics focuses on προαίρεσις, i.e. the possible motives for committing something unlawful, and intention also makes an appearance among the topics of magnitude.²³⁷

²³⁶ Cf. Kennedy (2007) 92. It has to be noted, however, that the discussion of pleasure may serve the same aim: with the help of these topics, the orator may be able to show that the defendant had a motive to commit the act.

²³⁷ See 1375a 7: καὶ ὁ ἐκ προνοίας μάλλον.

Here we have to note that the apparently contradicting statements of the parties, summarised as ‘X committed Y’ and ‘X did not commit Y’ do not necessarily need as a backing the same set of arguments. While the accuser can be content with establishing sufficient probability using arguments drawn from the first group of topics, arguing e.g. that the defendant had motives to commit a certain wrong against a certain person, the defendant may have to recur to topics like those of definition or fairness, which may imply suggesting that intention on his part was lacking.

Thus, ‘showing whether something happened or did not happen’ is not quite the same for both parties of the trial, and therefore the defendant at least may be perfectly justified, even in Aristotelian terms, in discussing things mentioned in the second group of topics. Let us now turn to the structure of the arguments.

Right after his critique of other authors, Aristotle gives a summary of what he himself considers to be the ἔντεχνος μέθοδος proper. It has to be based on the πίστεις, he argues, and a πίστις is some kind of an ἀπόδειξις, which takes the form of an ἐνθύμημα in rhetoric.²³⁸ An ἐνθύμημα is, in its turn, a sort of συλλογισμός (1355a 3–8). Enthymemes differ from syllogisms in general in that they are ‘concerned with things that are for the most part capable of being other than they are [...] and drawn from few premises and often less than those of the primary syllogisms’ (1357a 13–17). Since legal cases deal with contingencies *per definitionem*, legal reasoning makes ample use of enthymemes.

²³⁸ The text of the manuscripts contains the – probably later – addition καὶ ἔστι τοῦτο ὡς εἰπεῖν ἀπλῶς κυριώτατον τῶν πίστεων, which is bracketed by Kassel (1976). It may serve the aim of bringing the introduction closer to Aristotle’s doctrine of proof developed in the next chapter, which divides rhetorical *pisteis* into enthymemes and examples (see 1356b 2–6). For the present discussion, however, it is sufficient to concentrate on the enthymemes, as the functioning of the examples does not differ in this respect.

As for the facts of the case, then, the speakers have to persuade the judge that what they claim to have happened did actually happen. They may do so by composing enthymemes with the help of the *ἔνδοξα* listed in Aristotle's collection of topics. Such an enthymeme may sound like, to use an example given in the *Rhetoric*, 'it is probable that the defendant intended to harm the victim, for he wanted to take revenge for some wrong suffered.' The commonly shared belief underlying to this claim is that 'to be revenged is pleasurable; for if not attaining something is grievous, getting it is pleasurable, and angry people who do not get revenge are exceedingly pained' (1370b 30–32). Once the speaker can make the judge believe that the defendant was previously wronged by the victim, he can make a certain state of affairs seem more probable than others, even if it cannot be proved that the defendant actually committed what he is accused of. Before hearing the accusation and the defence, the judges cannot be acquainted with the facts. They can, and have to, consider the reliability of each of the competing narratives and arguments.

In the case of lawfulness/justice and magnitude, however, the judges do not have to rely on what they hear from the opponents. They can use their own principles, in addition to their knowledge of legal provisions, to decide whether 'something is important or trivial or just or unjust.' Yet also here, the orators may have something to contribute. A look at the corresponding topics may reveal how.

The topics about justice and injustice concentrate primarily on the problem of intent. The structure of an argument from definition may be like 'according to the legal definition, X did not commit Y, as he did not intend to commit it (although he may have committed Z).' An argument from fairness, in turn, may have the structure shown by the example of the man wearing the iron ring: 'according to the legal definition, X did commit Y, but as he did not intend to commit it, he should

not be declared guilty of Y (although he may have committed Z).’ In either of these cases, proof has to be focused on the lack of intent. The speaker may offer a conclusion pertaining to the lawfulness of the act, but the acceptance of this conclusion will depend on whether it matches the judges’ beliefs.

In a similar way, arguments concerning the magnitude of a certain wrong have to be backed by relevant proof. If the orator wants to make use of, e.g., the topic that ‘to commit the same fault often is a great thing,’ he has to persuade the judge that the defendant actually committed the same fault often. Aristotle gives some examples useful for proving the seriousness of a crime: the speaker may say that ‘a person has broken many norms of justice and gone beyond [a single crime], for example, [breaking] oaths, handshakes, promises, marriage vows; for this is a heaping up of wrongs’ (1375a 8–11). While such assertions may not seem directly relevant for the adjudication of the given case, they may help to show that the present crime was not a one-off error, but something that followed from the criminal character of the defendant.²³⁹ Still, it is the judge who has to decide whether these arguments hold and, more importantly, whether they provide sufficient grounds for a certain decision.

2 Aristotle on the Value and Function of Judicial Rhetoric

2.1 The Comparison of Deliberative and Judicial Rhetoric

Having said, in the introduction of Book 1, that the majority of subjects discussed in other textbooks is practically irrelevant for rhetoric, Aristotle then links his criticism of the absence of any discussion of proof to that of the exclusive attention paid to judicial rhetoric by arguing that

²³⁹ Cf. Rhodes (2004) 141–142, and Carey (2004) 3–4.

[i]t is for this reason that although the method of deliberative and judicial speaking is the same and though deliberative subjects are finer and more important to the state than private transactions, [the handbook writers] have nothing to say about the former, and all try to describe the art of speaking in a law court, because it is less serviceable to speak things outside the subject in deliberative situations {and deliberative oratory is less mischievous than judicial, but of more general interest}.²⁴⁰ (1354b 22–29)

This is the only passage in the *Rhetoric* that seems to support any claim concerning the superiority of deliberative over judicial rhetoric, and as such it deserves a careful reading.

Here and in the next paragraphs, Aristotle draws on two oppositions familiar to the readers of the *Nicomachean Ethics*: κοινός/αὐτῶν and οἰκεῖος/ἀλλότριος. The comparison serves to explain why textbook authors focused on judicial rhetoric exclusively, even though both branches share the same method, and speaking in the assembly (δημηγορικὴ πραγματεία) is more important for the community (πολιτικωτέρη) than legal debates which Aristotle identifies with issues arising from private contracts (συναλλάγματα). The reason, he argues, is that in a political debate there is less to gain by speaking outside the subject (ἔξω τοῦ πράγματος), and therefore deliberative oratory leaves less scope for the manipulation of the audience than the judicial branch, and its questions are of a more general interest (κοινότερον). The resistance to irrelevant arguments and emotional manipulation is due to the fact that in public deliberation, each ‘judge’ has to decide about something that is familiar to him (περὶ οἰκείων), so the audience can distinguish what is and what is not to the point. In judicial oratory, in turn, manipulation pays much better, for there the judges have to decide about matters concerning other people (περὶ ἀλλοτρίων), and hence they approach the dispute from the perspective of their own affairs (πρὸς τὸ αὐτῶν σκοπούμενοι),

²⁴⁰ On the reading see n. 247 below.

thus letting themselves to be persuaded by the litigants without making a proper judgement on the actual issue.

While the context of this comparison is an argument about the centrality of (rational and relevant) proof within rhetoric as a τέχνη, it gives an excellent illustration of practical insight at work in political deliberation, with the usual shortcomings of adjudication as a contrast. The first opposition, that of individual and common interest, describes the respective aims and motivation (or one might say, the substantive interest) of the average audience in legal and political debates. The second one, between affairs one feels personally involved in and those of strangers, refers to the competence as well as the quality of attention (the formal interest) of the decision-makers. Political debates make a better environment for rational persuasion, for issues discussed in the assembly are important for each citizen *qua* citizen, thus ensuring that they regard the problem as their own and, consequently, that they take informed interest in it.²⁴¹

The two cases also illustrate the beneficial and the dysfunctional causal directions. In political deliberation, the fact that the debate is of general importance (κοινότερον) leads to the decision being made περὶ οἰκείων. Legal judgements, in turn, are necessarily περὶ ἄλλοτριών, which makes it difficult for the judges to identify with the problem and to look at it from a less narrow perspective. The first case, then, allows civic expertise (*politikē aretē*) to connect to the superior, architectonic form of practical insight (*phronēsis*), which can then manifest itself in legislation.²⁴² In the second case, civic expertise does not directly contribute to the decision.

²⁴¹ See the genealogical parallel offered by Aristotle at *EN* 1161b 16–32.

²⁴² See *EN* 1141b 23–33: "Ἔστι δὲ καὶ ἡ πολιτικὴ καὶ ἡ φρόνησις ἡ αὐτὴ μὲν ἕξις, τὸ μέντοι εἶναι οὐ ταῦτ' οὐκ αὐταῖς. τῆς δὲ περὶ πόλιν ἢ μὲν ὡς ἀρχιτεκτονικὴ φρόνησις νομοθετικὴ, ἢ δὲ ὡς τὰ καθ' ἕκαστα τὸ κοινὸν ἔχει ὄνομα, πολιτικὴ· αὕτη δὲ πρακτικὴ καὶ βουλευτικὴ· [...] δοκεῖ δὲ καὶ

While the above reading of the passage may explain why (the general practice of) judicial oratory would seem inferior to (the general practice of) public deliberative speaking if considered in the light of Aristotle's notion of *politikē aretē*, it says practically nothing about the comparison of judicial and deliberative rhetoric as seen from the perspective of the rhetorical *technē*.

The first thing to note is that there is no difference between the two branches in terms of method: both use the same sorts of proof. This is hardly surprising, given that they belong to the same *technē*: judicial and deliberative rhetoric *qua* rhetoric cannot differ among themselves.²⁴³

Secondly, there are a number of comparisons within the passage: in addition to (1) method, also (2) the subjects discussed and (3) the situations where speeches are delivered are compared, before coming to (4) what seems to be a summary comparison of the two branches. In the cases of (2)–(4), clear distinctions are made.

As for the subjects, Aristotle finds public²⁴⁴ deliberative oratory (δημηγορική πραγματεία) both 'finer and more relevant for the *polis*' than dealing with contracts (συναλλάγματα). This distinction based on the opposition of private and public good seems to be common wisdom among Aristotle's contemporaries,²⁴⁵ but it is about the perceived social value of rhetorical activity rather than the

φρόνησις μάλιστα εἶναι ἢ περὶ αὐτὸν καὶ ἕνα· καὶ ἔχει αὕτη τὸ κοινὸν ὄνομα, φρόνησις· ἐκείνων δὲ ἢ μὲν οἰκονομία ἢ δὲ νομοθεσία ἢ δὲ πολιτική, καὶ ταύτης ἢ μὲν βουλευτική ἢ δὲ δικαστική.

²⁴³ Cf. Garver (2009) 3–5 on the importance of the three kinds of rhetoric, but see also *ibid.* 5, note 6, and 14–16 on the comparison of judicial and deliberative rhetoric.

²⁴⁴ Later Aristotle distinguishes between private and public deliberation, see 1358b 9–10.

²⁴⁵ See e.g. *Pl. Ap.* 23b 7–c 1, where the service to the god is said to leave no place for either Socrates' own affairs or those of the city (similarly at 30a 5–7), with the explanation at 31b 1–5 that by doing so, he actually looks after his fellow citizens. See also *Lg.* 875a5–b 1 about the difficulty of realising ὅτι πολιτικῇ καὶ ἀληθεῖ τέχνῃ οὐ τὸ ἴδιον ἀλλὰ τὸ κοινὸν ἀνάγκη μέλειν—τὸ μὲν γὰρ κοινὸν συνδεῖ, τὸ δὲ ἴδιον διασπᾷ τὰς πόλεις—καὶ ὅτι συμφέρει τῷ κοινῷ τε καὶ ἰδίῳ, τοῖν ἀμφοῖν, ἦν τὸ κοινὸν τιθῆται καλῶς μᾶλλον ἢ τὸ ἴδιον. *Isocr. Paneg.* 1 contrasts the glory of the sportsmen who excel with their body with the lack of reward for those who want to serve the community through their own efforts (τοῖς δ' ὑπὲρ τῶν κοινῶν ἰδίᾳ πονήσασιν καὶ τὰς αὐτῶν ψυχὰς οὕτω παρασκευάσασιν ὥστε καὶ τοὺς ἄλλους ὠφελεῖν δύνασθαι, τούτοις δ' οὐδεμίαν τιμὴν ἀπένεμιν).

theoretical importance of a field. Moreover, the value judgement formulated here links closely to the next two points of criticism, as they together insinuate that other textbook authors are morally reproachable for focusing on judicial rhetoric.

The comparison of judicial and deliberative situations has been anticipated by the suggestion that judicial discretion should be limited (1354a 31–b 13) and will be further developed by the claim about the audience’s reasons for paying attention (1354b 29–1355a 1). This also means, however, that the difference here lies within the quality of the audience rather than the rhetorical inquiry.

The final point of comparison seems much more straightforward.

Δημηγορία is described as ‘less mischievous’ (ἥττον [...] κακοῦργον) and ‘of more common interest’ (κοινότερον)²⁴⁶ than δικολογία.²⁴⁷ Κοινότερον is explained by the subsequent statement, according to which ‘there the judge judges about matters that affect himself so that nothing is needed except to show that circumstances are as the speaker says’ (1354b 29–31).²⁴⁸ Κακοῦργον is much more striking, and may be taken as, strictly speaking, the core of the negative judgement about judicial rhetoric.

Kassel rightly points to 1404b 39 and SE 172b 20 as possible parallels,²⁴⁹ yet his interpretation that ‘in b 22–1355 a 3 geht es nicht um den Gegensatz logisch

²⁴⁶ The conjunction between ἥττον [...] κακοῦργον and κοινότερον is expressed by ὅτι in some manuscripts and ἀλλὰ in others, see the apparatus of Kassel (1976), who opts for ἀλλὰ (and is translated by Kennedy [2007] 33, note 18), and Ross (1959), who gives ὅτι in his text, and is in agreement with most editors as well as the commentaries of Cope (1877) and Grimaldi (1980).

²⁴⁷ The edition of Kassel (1976) brackets the phrase καὶ ἥττον ἐστὶ κακοῦργον ἢ δημηγορία δικολογίας, ἀλλὰ κοινότερον as a later addition. His reasons for doing so are given in Kassel (1971) 120–121. While he may be right in that it is difficult to establish a link between ἥττον κακοῦργον and κοινότερον (cf. the previous note), one wonders if it is sufficient reason for disposing of the text; cf. Grimaldi (1980) 17 *ad loc.* The argument that ‘[d]ie Substantive δημηγορία und δικολογία kommen nirgends beim echten Aristoteles vor’ does not hold (cf. also 1414b 2–3 and 1417b 12), as Kassel seems to have recognised himself, see Kassel (1976) 5 *in app.*

²⁴⁸ Cf. Grimaldi (1980) 17 *ad loc.*

²⁴⁹ Kassel (1971) 120, note 12. Further passages for the ‘adjective [...] applied in a peculiar sense to sophistical reasoning’ are given by Cope (1877) 17 *ad loc.*

korrekt – sophistisch verdrehend, sondern um den Gegensatz sachlich – emotional²⁵⁰ is somewhat misleading. We have seen that Aristotle classifies more or less everything that is not proof as ἔξω τοῦ πράγματος, this latter therefore including emotional manipulation as well as irrelevant arguments.²⁵¹ Also the parallels, to which Grimaldi adds a passage from Plato’s *Gorgias* (483a),²⁵² refer to κακουργεῖν as a practice of speaking about something else than the issue under discussion, by way of exploiting homonyms,²⁵³ or asking vague questions or several questions at the same time.²⁵⁴ Of particular relevance is *SE* 172b 20–22, where Aristotle says that ‘[t]his unfair method [...] is much less practicable (δύνανται δὲ νῦν ἥττον κακουργεῖν) than formerly; for people demand, “What has this to do with the original question?” (τί τοῦτο πρὸς τὸ ἐν ἀρχῇ)’.²⁵⁵

ἥττον κακοῦργον, then, seems to be explained by κοινότερον²⁵⁶ and, accordingly, by the passage following it. In that case, however, κοινότερον does not mean that judicial rhetoric would do anything wrong directly.²⁵⁷ Rather, the passage means that deliberative rhetoric gives less occasion for rhetorical trickery²⁵⁸ because due to the subjects discussed, the audience is more likely to pay attention to the arguments. Thus, it seems that the last phrase does not add

²⁵⁰ Kassel (1971) 120–121.

²⁵¹ See the introduction of this chapter.

²⁵² Grimaldi (1980) 17 *ad loc.* At Pl. *Grg.* 483a 2–4, Calicles reproaches Socrates, saying ὁ δὲ καὶ σὺ τοῦτο τὸ σοφὸν κατανεοηκῶς κακουργεῖς ἐν τοῖς λόγοις, ἐὰν μὲν τις κατὰ νόμον λέγῃ, κατὰ φύσιν ὑπερωτῶν, ἐὰν δὲ τὰ τῆς φύσεως, τὰ τοῦ νόμου.

²⁵³ 1404b 37–39: τῶν δ’ ὀνομάτων τῶ μὲν σοφιστῇ ὁμωνυμίαι χρήσιμοι (παρὰ ταύτας γὰρ κακουργεῖ). This is the case in Pl. *Grg.* 483a 2–4 as well, see the previous note.

²⁵⁴ *SE* 172b 10–22.

²⁵⁵ I quote the translation of Forster (1955).

²⁵⁶ Suggesting perhaps that in the text ὅτι should be preferred to ἀλλὰ, cf. note 246 above, and Grimaldi (1980) 17 *ad loc.*

²⁵⁷ As other occurrences of *kakourgia/kakourgikos* in the *Rhetoric* would suggest: see 1389b 8, 1390a 18, and 1391a 18.

²⁵⁸ This sense is reflected by the French translation of Dufour (1932), who renders ἥττον [...] κακοῦργον as ‘elles prêtent moins aux tromperies’.

anything new to what Aristotle has said so far, only reformulates the preceding observation that ‘it is less serviceable to speak things outside the subject in deliberative situations’.

To sum up, the distinction Aristotle makes between deliberative and judicial oratory derives from the difference between their respective subjects. It is due to that difference that deliberative and judicial situations allow for irrelevant arguments to a different extent. This does not seem to contradict the statement that the two branches of rhetoric use the same method of proof, nor to support any claim that Aristotle would give priority to deliberative over judicial rhetoric.

2.2 The Branches of Rhetoric

A look at other passages of the *Rhetoric*, in which Aristotle makes a comparison between different branches of rhetoric confirms this impression. A theoretical discussion involving three branches (εἶδη)²⁵⁹ can be first found in Chapter 3 of Book I (1358a 36–1359a 5). The distinction Aristotle makes is based on three kinds of audience (οἱ ἀκροαταὶ τῶν λόγων). Here, the hearers of forensic and deliberative speeches are equally termed κριτής: the former are judges of things past (τῶν γεγενημένων), while the latter decide about the future (τῶν μελλόντων). Epideictic speeches, in turn, are addressed to observers (θεωρός). Each of the three branches has its respective dichotomy of activities (προτροπή/ἀποτροπή; κατηγορία/ἀπολογία; ἔπαινος/ψόγος) and its characteristic time aspect (χρόνοι).

Later in the same chapter, discussing the respective ends (τέλος) of the three genres, Aristotle formulates these as the subject matter of the main issues of a

²⁵⁹ On the meaning of εἶδη at 1358a 36, see Grimaldi (1980) *ad loc.* and Kennedy (2007) 46–47. See also Garver (2009) 2–3, note 2, for some parallels.

debate:²⁶⁰

sometimes one would not dispute (ἀμφισβητήσαιεν) other factors; for example, a judicial speaker [might not deny] that he has done something or done harm, but he would never agree that he has [intentionally] committed injustice; for [if he admitted that,] there would be no trial. Similarly, deliberative speakers often grant other factors, but they would never admit that they are advising things that are not advantageous [to the audience] or that they are dissuading [the audience] from what is beneficial; and often they do not consider (οὐδὲν φροντίζουσιν) that it is unjust to enslave neighbors or those who have done no wrong. (1358b 30–37)

While the statement that deliberative speakers may not pay attention to what is just can be interpreted as simply meaning that they do not address the problem of justice in their speech,²⁶¹ and qualified by Aristotle's parenthetical remark that οὐ γὰρ δεῖ τὰ φαῦλα πείθειν (1355a 31),²⁶² it certainly does not suggest that deliberative rhetoric would be superior to judicial.

Also at the beginning of Book II, where Aristotle introduces his doctrine on character and emotions, deliberative and judicial rhetoric are repeatedly set next to each other. The importance of character and emotions (in addition to argument) is justified by that rhetoric aims at judgements, and judgements are made in

²⁶⁰ This is indicated by the first sentence, where Aristotle uses the verb ἀμφισβητήσαιεν, which clearly refers to some kind of disagreement or debate, cf. *LSJ*, s.v. ἀμφισβητέω. Schütrumpf (1994) 107 denies that justice would be the subject matter of judicial rhetoric (in his interpretation it is the past events mentioned at 1358b 3–5), saying that '[j]ustice or injustice—obviously in the sense of a decision that an action was just or not and restoring justice [...]—become in Aristotle the goals of judicial rhetoric' (ibid. note 50). While Aristotle certainly thinks that the orator should seek to elicit a decision that realises the value corresponding to the *telos* of the speech, i.e. one that is just/advantageous/honourable, it seems to be a mistake to limit the meaning of *telos* to that kind of 'goal'. It might be rather difficult to disagree about whether something is just or unjust without addressing the question of justice in the speech (cf. 1358b 25–27: [sc. τέλος] τοῖς δὲ δικάζομένοις τὸ δίκαιον καὶ τὸ ἄδικον, τὰ δ' ἄλλα καὶ οὗτοι συμπαραλαμβάνουσι πρὸς ταῦτα, and 36–37: ὥς δ' {οὐκ} ἄδικον τοὺς ἀστυγείτονας καταδουλοῦσθαι καὶ τοὺς μηδὲν ἀδικοῦντας, πολλάκις οὐδὲν φροντίζουσιν). On the abstract and concrete senses of justice, see sect. 1.1 and 1.2 above. Grimaldi (1980) 82 *ad* 1358b 8–29, speaks of the discourse attempting 'to realize its proximate τέλος' (the auditor being the 'ultimate τέλος') on the one hand, and the auditor's 'effort to make a judgment in terms of *this* proximate τέλος' on the other. See also Grimaldi (1980) 83 *ad* 1385b 24, 26, and 30. In sum, by describing the *telē* of the three branches, Aristotle seems to try to evade Plato's objection that rhetoric has no specific subject that would distinguish it as a *technē*. See also Garver (2009) 12. On the possible connection between the *telē* and later doctrines of *staseis*, see Braet (1999), and ch. IV below.

²⁶¹ As suggested by Cope (1877) vol. I, 55. Cf. Grimaldi (1980) 84 *ad loc.*

²⁶² This is pointed out by Kennedy (2007) 49, note 83.

deliberation as well as judicial decisions.²⁶³ Their differences are mentioned within this basic juxtaposition: while the character of the speaker may be of more importance in the deliberative genre, the emotions of the audience are more likely to contribute to the success of persuasion in trials (1377b 25–26 and 28–31).²⁶⁴

The different genres receive a similarly equal treatment in the discussion of enthymemes, where the importance of the knowledge of facts is emphasised. As conclusions have to be based on facts, knowing (at least some of) the relevant circumstances is necessary. This applies for advisory speeches as well as praise and blame, accusation and defence, independently of the subject (1396a 4–30).

In Book III, as a conclusion to his chapters on *lexis*, Aristotle discusses different kinds of style. He distinguishes oral and written styles on the one hand, and the ones corresponding to the branches of rhetoric on the other (1413b 3–5).²⁶⁵ This latter is based on the different degrees of detail (ἀκρίβεια) in the arguments (1414a 8–17). Here, Aristotle puts the style of public deliberation (δημηγορική λέξις) on one end of the scale, and speeches delivered to ‘a single judge’ on the other.²⁶⁶ Speaking to several judges of a court takes the middle place. Interestingly, he connects ἀκρίβεια to relevance, as he observes that the situation with a single

²⁶³ 1377b 20–22: ἐπεὶ δὲ ἔνεκα κρίσεώς ἐστιν ἡ ῥητορική (καὶ γὰρ τὰς συμβουλὰς κρίνουσι καὶ ἡ δίκη κρίσις ἐστίν), thus interestingly omitting epideictic rhetoric which was still present a couple of lines earlier in the first sentence of Book II: Ἐκ τίνων μὲν οὖν δεῖ καὶ προτρέπειν καὶ ἀποτρέπειν, καὶ ἐπαινεῖν καὶ ψέγειν, καὶ κατηγορεῖν καὶ ἀπολογεῖσθαι (1377b 16–17).

²⁶⁴ It should be noted that in what follows, the role of emotions in deliberative persuasion is also highlighted: ‘to a person feeling strong desire and being hopeful, if something in the future is a source of pleasure, it appears that it will come to pass and will be good; but to an unemotional person and one in a disagreeable state of mind, the opposite’ (1378a 3–5). The reference to the future (τὸ ἐσόμενον, ἔσεσθαι) and the fact that this remark follows one on ἀδικεῖν, makes it clear that here Aristotle speaks of deliberative speeches.

²⁶⁵ At 1413b 4–5 he only mentions δημηγορική and δικανική, and keeps on ignoring epideictic speeches until 1414a 18–19, where he merely says that ἡ μὲν οὖν ἐπιδεικτική λέξις γραφικωτάτη· τὸ γὰρ ἔργον αὐτῆς ἀνάγνωσις· δευτέρα δὲ ἡ δικανική. He does, however, mention poetry, which he presumably regards as belonging to the domain of epideictic rhetoric, but cf. Garver (2009) 6.

²⁶⁶ Here Kennedy (2007) 228, note 146 mentions tyranny as an obvious context for decisions made by a single judge (he used the term ‘monarchy’ in the first edition: Kennedy [1991] 256, note 168). It may be more adequate, however, to think of arbitration, as Cope (1877) vol. III, 152 does.

judge is the least promising for manipulative techniques, as ‘what pertains to the subject and what is irrelevant’²⁶⁷ is more easily observed [by a single judge], and controversy is gone, so the judgment is clear’ (1414a 12–14). This suggests that in forensic speeches it is more difficult to depart from the actual matter in question unnoticed than in (public) deliberative speeches, which seems to contradict what Aristotle writes in the introduction of Book I (cf. 1354b 27–29).²⁶⁸ What is important for us here, however, is that neither of the genres can be seen as more ‘paradigmatic’ than the others.

The discussion of *taxis*, again, begins with a swipe at previous textbooks. The necessary parts of a speech, Aristotle argues, are *prothesis*, a statement, and *pistis*, proof intended to support it (1414a 31–37). Therefore, those making generalisations based on judicial speeches are wrong.²⁶⁹ Even more so, as some of the parts they distinguish are not even necessary for forensic rhetoric. There are two examples of parts belonging mainly or exclusively to forensic rhetoric. Epideictic and deliberative speeches cannot contain the kind of *diēgēsis* they describe on the basis of judicial ones, nor can they have τὰ πρὸς τὸν ἀντίδικον, ἢ ἐπίλογον τῶν ἀποδεικτικῶν. Then there are certain parts (*prooimion*, *antiparabolē*, *epanodos*) which ‘sometimes occur in public speeches when there is debate on two sides of a question (for there is often both accusation and response), but not insofar as there is deliberation’²⁷⁰ (1414b 2–4). While these remarks question the way most

²⁶⁷ *Oikeion* and *allotrion tou pragmatos*: making a distinction between the two is the task of the virtue of *synesis*, which is at work in all kinds of decision-making (*krisis*), see *EN* 1161b 16–26, cf. *Pl.* *R.* 376b 5–6.

²⁶⁸ Cf. Kennedy (1991) 256, note 168, pointing out the problematic relation of the passage to 1354b 27–1355a 3 (the remark is omitted from the second edition). Cope (1877) vol. III, 151–154 argues, in his notes, that Aristotle does not make a clear distinction between an exact style and a detailed argument; cf. Kennedy (2007) 228, note 146.

²⁶⁹ Cf. 1354b 16–21, where Aristotle contrasts other authors’ discussing the parts of the speech (*diegesis* and *prooimion* in particular) to their silence concerning the *pisteis entechnoi*.

²⁷⁰ *Antilogia* refers to a direct exchange between two (or more) orators, performed in front of the

earlier authors conceived of *taxis* insofar as it is shown that forensic rhetoric is not the paradigmatic case of rhetoric in general, no other paradigm is offered to replace it. Rather, corresponding to his aim of treating rhetoric as a *technē*, Aristotle seeks to show what is general and necessary in the arrangement of speeches.

In the chapter on *prooimia*, the role of introduction is discussed according to the three genres of rhetoric. Yet there are certain functions in terms of which the different kinds of speeches overlap. In the case of the introduction, it may serve two main goals: the first one is specific (*idion*) to it: ‘to make clear what is the “end” [*telos*] for which the speech [is being given]’; the other kind of *prooimion* is called ‘remedy’ (*iatreuma*) and is aimed at removing any disadvantage of the speaker’s situation (1415a 22ff). Such disadvantages, however, may not be absent from deliberative rhetoric, either.²⁷¹ As Aristotle observes, there are cases where ‘it is necessary to attack or absolve and to amplify or minimise’ (1415b 37–38).

Coming to the proofs, in Chapter 17, Aristotle highlights the questions where dispute may arise and where, consequently, proof is needed. In the case of judicial rhetoric, these are four: facts, harm, importance and justification (1417b 21–27). This is generally considered to be something like what later theories of *staseis* contain.²⁷² Yet the method of examining the debate with the help of such a list of possible issues is not limited here to forensic speeches. While practically bracketing

audience. It is in this sense that it is opposed to *symbolē*, an address by a single orator. We do not have to interpret the latter as ‘the coming to an agreement on the part of the council’, as did Kennedy (1991) 259, note 173 (‘on the part of the council’ is omitted from the second edition: Kennedy (2007) 230, note 151).

²⁷¹ ‘Remedies’ are ‘common’ (*koina*) in two senses. First, they may be used not only in forensic speeches but also in epideictic (cf. 1414b 40–1415a 3, where Aristotle explicitly states that some of the epideictic *prooimia* are ἐκ τῶν δικανικῶν προοιμίων) or deliberative ones. See Kennedy’s rendering of the sentence: ‘The other kinds that are used are *remedies* [*iatreumata*] and are common [to all species of rhetoric].’ Kennedy (2007) 233. Second, they appear also in other parts of the speech (1415b 9–10: ἔτι τὸ προσεκτικὸς ποιεῖν πάντων τῶν μερῶν κοινόν, ἐὰν δέη). It is in this second sense that they are properly opposed to clarifying the *telos* of the speech, which is in order only at the beginning.

²⁷² See e.g. Kennedy (1991) 242, note 191. Aristotle’s possible influence on *stasis* theories will be discussed in ch. IV.

the epideictic genre,²⁷³ Aristotle summarises what can be debated in deliberative rhetoric: ‘whether the events predicted [by a previous speaker] will occur or, if they do, whether the policy recommended is unjust or disadvantageous or unimportant. One also should look to see if any accidental details are falsified; for these are sure signs that he also falsifies things more to the point’ (1417b 34–1418a 1).

Aristotle’s advice on the arrangement of the refutations within the speech reinforce the impression that judicial and deliberative rhetoric are discussed in parallel terms. He explicitly says that ‘[i]n both deliberation and in court the opening speaker should [usually] state his own premises first, then should meet those [expected] of his opponent by disproving and tearing them to pieces before he can make them’ (1418b 7–9).

Summing up the above overview, we may state that Aristotle overtly and deliberately departs from the earlier textbook tradition in trying to set forensic rhetoric within a more general framework of rhetoric. Consequently, it is certainly true that judicial rhetoric is not depicted in the *Rhetoric* as the paradigm of all genres of rhetoric. The passages discussed clearly show, though, that no other paradigm is offered: the description of the three branches (or at least of forensic and deliberative rhetoric) is very balanced throughout, which is due to the fact that Aristotle consequently follows certain methodological principles. This, in turn, follows from his understanding of what a *technē* is:²⁷⁴ he constantly seeks to determine the common elements of the three branches, which are also defined by certain common characteristics.

²⁷³ In epideictic speeches, no *antilogia* can be expected. Controversies, even if only in terms of possibility, may however help the speaker to see where proof is needed: this can be the actual existence of an (otherwise incredible) fact or the identity of the person who accomplished it (see 1417b 32–34).

²⁷⁴ Cf. n. 190 above.

2.3 Isocrates on Deliberative and Judicial Rhetoric

Aristotle's remarks concerning the scope and circumstances of judicial oratory have parallels in Isocrates. It seems worthwhile to briefly reconstruct Isocrates' views on the value of different branches of rhetoric as they may serve as a contrast to Aristotle's comparison summarised above.

While tradition holds that Isocrates has composed a textbook on rhetoric,²⁷⁵ doubt has repeatedly been raised in modern scholarship whether he really did.²⁷⁶ It is certain, however, that his alleged *technē* has not been preserved. This makes his orations of particular importance for any investigation into his theoretical views on rhetoric.

In the speech *Against the sophists* (or. 13), a pamphlet written about 390 BC,²⁷⁷ Isocrates has published his creed as a teacher of rhetoric. The major part of the now fragmentary work (13.1–18) contains the critique of recent sophists (cf. 13.19: οἱ [...] ἄρτι τῶν σοφιστῶν ἀναφύομενοι καὶ νεωστὶ προσπεπωκότες ταῖς ἀλαζονείαις). In the last couple of paragraphs (13.19–21)²⁷⁸ Isocrates turns to the authors of earlier textbooks (οἱ πρὸ ἡμῶν γεγόμενοι καὶ τὰς καλουμένας τέχνας γράψαι τολμήσαντες). He condemns these authors because of their exclusive interest for judicial rhetoric, and their consequent neglect for political speaking. His three reasons for this are, then, (1) the perceived depravity of forensic oratory,

²⁷⁵ Cf. Kennedy (1963) 70–73.

²⁷⁶ See e.g. Thiele (1892). Some think that a textbook was composed by one of Isocrates' pupils, see e.g. Navarre (1900) 188–189, Blass (1874) vol. II, 96–98. Cf. Kennedy (1963) 71, note 43, with further references to earlier scholarship. Cahn (1989) rejects the view that Isocrates' *technē* was a textbook as irreconcilable with the rhetorician's self-understanding. Papillon (1995) proposes an interpretation according to which the *technē* consisted of Isocrates' speeches. Most recently see Walker (2011), arguing for the existence of the textbook.

²⁷⁷ On the chronology of Isocrates' works see most recently Mandilaras (2003) 5–6.

²⁷⁸ Paragraph 22, where the work breaks off, is the transition to the actual arguments supporting his case for political oratory. Cf. most recently Walker (2011) 97, with reference to Mirhady in Mirhady and Too (2000) 66, note 16. See also Cahn (1989) 136–137, quoting Eucken (1983) 5, 35, who considers the speech 'an intentional fragment', and Too (1995) 163.

(2) the unrealised capacity of rhetoric to cover all kinds of oratory, (3) and the authors' neglect of the advantages of political oratory.²⁷⁹ These advantages are also of moral nature: while Isocrates is quick to state that 'there does not exist an art of the kind which can implant sobriety and justice in depraved natures',²⁸⁰ he nevertheless adds that 'the study of political discourse (τῶν λόγων τῶν πολιτικῶν ἐπιμέλεια) can help more than any other thing to stimulate and form such qualities of character' (13.21).

While these remarks are directed against other authors, and run parallel with Aristotle's criticism at least to the extent that the existence of general rules is mentioned,²⁸¹ they clearly show certain aspects of judicial rhetoric which is found wanting by Isocrates. He probably seeks to evoke some kind of social perception when criticising the rhetoricians' preference for τὸ δυσχερέστατον τῶν ὀνομάτων (even though he does not elaborate on either the content or the causes of that negative view).²⁸² In addition to that, the emphasis on the superior value of political rhetoric makes it clear that the judicial branch does not offer the same advantages in terms of character building.

The *Panegyricus* (or. 4), published some ten years after the *Against the sophists*, is a piece of Isocrates' political oratory, an advisory speech addressed to a pan-Hellenic audience. In addition to doing political oratory, however, Isocrates

²⁷⁹ (1) οἵτινες ὑπέσχοντο δικάζεσθαι διδάξειν, ἐκλεξάμενοι τὸ δυσχερέστατον τῶν ὀνομάτων, ὃ τῶν φθονούντων ἔργον ἢν λέγειν ἄλλ' οὐ τῶν προεστώτων τῆς τοιαύτης παιδείσεως (13.19); (2) καὶ ταῦτα τοῦ πράγματος, καθ' ὅσον ἐστὶ διδακτὸν, οὐδὲν μᾶλλον πρὸς τοὺς δικανικοὺς λόγους ἢ πρὸς τοὺς ἄλλους ἅπαντας ὠφελεῖν δυναμένου (13.20); (3) ἐπὶ τοὺς πολιτικοὺς λόγους παρακαλοῦντες, ἀμελήσαντες τῶν ἄλλων τῶν προσόντων αὐτοῖς ἀγαθῶν πολυπραγμοσύνης καὶ πλεονεξίας ὑπέστησαν εἶναι διδάσκαλοι (ibid.).

²⁸⁰ Cf. Pl. *Grg.* 519d 1–4. See Too (1995) 153.

²⁸¹ This common point is also highlighted by Benoit (1990) 257.

²⁸² The reason may well be the connection between judicial rhetoric and sycophancy, which Isocrates quite often alludes to, see e.g. 15.38, 41. The suggestion of Mirhady in Mirhady and Too (2000) 65–66, note 13, according to which the phrase τὸ δυσχερέστατον τῶν ὀνομάτων may refer to the peculiar terminology of judicial rhetoric, does not seem very convincing.

talks about it, too. At the beginning of the speech, he explains his choice of career, arguing that political oratory is ‘the highest kind of oratory [...] which deals with the greatest affairs and, while best displaying the ability of those who speak, brings most profit to those who hear’ (4.4).

He then goes on to justify his choice of style as well, defending his carefully polished speeches against those ‘who have gone so far astray that they judge the most ambitious oratory by the standard of the pleas made in the petty actions of the courts; as if both kinds should be alike and should not be distinguished, the one by plainness of style, the other by display’ (4.11).

At the end of the speech, in turn, he seeks to convince those of his audience ‘who make claims to eloquence’ that they have to ‘stop composing orations on “deposits”, or on the other trivial themes’ (4.188), and turn to orations serving the benefit of the audience (4.189).

In these passages, the primary comparison seems to be between the different subjects discussed by the different branches of oratory. Political speakers deal with the most important affairs (περὶ μεγίστων), while judicial speeches are said to be about private obligations (περὶ τῶν ἰδίων συμβολαίων) or deposits (πρὸς [...] τὴν παρακαταθήκην).²⁸³ More important matters are more profitable in a non-material sense, as they allow for a higher degree of elaboration on the one hand, thus letting the orator to display his skills, and bring more profit for the whole community on the other.

In the *Antidosis* (or. 15), a fictitious judicial speech,²⁸⁴ Isocrates elaborates, once again, on the principles of his rhetorical doctrine. The speech is prefaced by

²⁸³ On the interpretation of τὴν παρακαταθήκην see Bonner (1920), who is followed by Norlin (1928) 240–241, see *ibid.* note (a).

²⁸⁴ Cf. 15.13: ἤδη δ’ ἀναγιγνώσκετε τὴν ἀπολογίαν τὴν προσποιουμένην μὲν περὶ κρίσεως γεγράφθαι, βουλομένην δὲ περὶ ἐμοῦ δηλῶσαι τὴν ἀλήθειαν.

an introduction, where Isocrates carefully distances himself from the writers of forensic (and epideictic) speeches²⁸⁵ and explains his motivation, which actually comes from a trial where he lost an *antidosis* case. The victim of malicious litigation,²⁸⁶ Isocrates then makes a comparison between philosophy (or philosophical rhetoric) and judicial rhetoric, mainly in terms of those practising them. Exponents of the former ‘are wiser and better and of more use to the world than men who speak well in court’ (15.47), as judicial rhetoric only develops a ‘capacity for intrigue’, whereas its Isocratean counterpart is the ‘pursuit of wisdom’. Courtroom speakers are, consequently, ‘tolerated only for the day’, while philosophically minded orators are held in high esteem (15.48). Returning to the question of skills, Isocrates then adds that those in pursuit of judicial rhetoric are likely to be ‘unequal to higher eloquence’, while philosophical rhetoric is more rewarding also in the sense that its practitioners ‘could master the oratory of the courts’ (15.49).²⁸⁷

Finally, in the *Panathenaicus* (or. 12) the comparison of the branches of rhetoric frames the actual speech in a way similar to that we encounter in the *Panegyricus*, also mentioning the differences both in style and importance. At the outset, Isocrates explains that he did not choose the sort of oratory ‘which gives the impression of having been composed in a plain and simple manner [...] which those

²⁸⁵ Both in terms of form (15.1: Εἰ μὲν ὁμοίως ἦν ὁ λόγος ὁ μέλλων ἀναγνωσθήσεσθαι τοῖς ἢ πρὸς τοὺς ἀγῶνας ἢ πρὸς τὰς ἐπιδείξεις γιγνομένοις, οὐδὲν ἂν οἶμαι προδιαλεχθῆναι περὶ αὐτοῦ) and quality (15.2: εἰδὼς ἐνίους τῶν σοφιστῶν βλασφημοῦντας περὶ τῆς ἐμῆς διατριβῆς καὶ λέγοντας ὡς ἔστιν περὶ δικογραφίαν, καὶ παραπλήσιον ποιοῦντας ὥσπερ ἂν εἴ τις Φειδίαν τὸν τὸ τῆς Ἀθηνᾶς ἔδος ἐργασάμενον τολμῶη καλεῖν κοροπλάθον, ἢ Ζεῦξιν καὶ Παρράσιον τὴν αὐτὴν ἔχειν φαίη τέχνην τοῖς τὰ πινάκια γράφουσιν). He further emphasises his distance from judicial affairs at 15.38, 40–42.

²⁸⁶ On the parallels with Plato’s *Apology* see e.g. Bonner (1920a), Momigliano (1993) 59, Papillon (1997). Concerning the function of these parallels and the interpretation of the speech see especially Ober (2004) and Too (2008) 24.

²⁸⁷ The superiority of ‘those public issues which are important and noble and promote human welfare’ is further emphasised at 15.276. I quote the translation of Too (2008).

who are clever at conducting law-suits urge our young men to cultivate, especially if they wish to have the advantage over their adversaries' (12.1) but he devoted himself 'to giving advice on the best interests of Athens and of the rest of the Hellenes' (12.2).²⁸⁸

At the end of the speech, Isocrates concludes by commending his students who

prefer, as more weighty and more worthy of serious study, discourses which are composed for instruction and, at the same time, with finished art to others which are written for display or for the law-courts, and who prefer for the same reason discourses which aim at the truth to those which seek to lead astray the opinions of their auditors, and discourses which rebuke our faults and admonish us to those which are spoken for our pleasure and gratification. (12.271–272)

Here, the opposition of true (or educative) and sophistic rhetoric adds a further dimension to the comparison. While a good speech still has to address serious topics and be finely polished, Isocrates makes it explicit, in a rather Platonic tone, that the speaker has to seek and speak the truth, even if that makes the audience less receptive.

In the *Panathenaicus*, there is a further passage that qualifies the otherwise rather black-and-white contrast of judicial and deliberative rhetoric. There, Isocrates makes a general remark on the different sorts of audience: there are people 'who take pleasure, not in the things which have been spoken in deep seriousness, but rather in the orators who rail at each other most of all at the public assemblies, or, if the speakers refrain from this madness, in those who deliver encomia on the most trivial things or on the most lawless men who have ever lived' (12.135). While talking primarily about audiences, Isocrates also distinguishes between good and bad behaviour and topics. He seems to suggest that even in political (and epideictic) oratory there are serious and not serious subjects. That, to

²⁸⁸ His choice, with the opposition of private and public affairs, is repeated at 12.11 and 12.144.

be sure, also allows for the conclusion that judicial rhetoric is disqualified because of its subject.

The above overview suggests that Isocrates distinguishes between kinds of rhetoric according to their subjects. While his remark on the unity of rhetorical knowledge (13.20) reveals that, similarly to Aristotle, he sees no difference between judicial and deliberative oratory in terms of method or teaching, he certainly regards some problems as more worthy than others of being discussed by orators. This aspect of speeches seems to be the exclusive basis of Isocrates' distinctions, as, unlike Aristotle, he does not try to formulate any other criteria for separating branches of rhetoric.²⁸⁹ On the one hand, Isocrates does not hesitate to use the form of a courtroom speech to defend his views and his practice of teaching, as he apparently regards his subject to be of public interest.²⁹⁰ On the other hand, however, he despises forensic oratory because it deals with petty affairs.²⁹¹

Moral and (occasionally) stylistic differences, primarily between judicial and deliberative rhetoric, are also mentioned in Isocrates' speeches. Moral ones, which refer to the effect of a speech on its audience, follow from the topics discussed. As private legal disputes are, in Isocrates' eyes, expressions of nothing else than individual greed, they cannot have an edifying influence on the hearers, or on those who study that branch of rhetoric. As for the differences of style, Isocrates

²⁸⁹ Cf. Haskins (2004) ch. 3, especially 57–66. The evidence of the fragments, quoted by Kennedy (1963) 72, seems to support this, see Radermacher (1951) B XXIV 20–21.

²⁹⁰ Thus the remark of Classen (2011) 80, according to which the *Antidosis* 'soll wie eine Gerichtsrede wirken, trägt aber zugleich Züge einer Lobrede, die Isokrates – teilweise indirekt – auf sich selbst verfasst hat' refers to a distinction that for Isocrates did not have any meaning (as Classen himself seems to realise, see *ibid.* 104).

²⁹¹ In his recent book, Jeffrey Walker argues that Isocrates' contempt was directed at petty lawsuits only and not judicial rhetoric in general, see Walker (2011) 96–97. The above passages suggest, however, that Isocrates did not really count with the possibility of judicial oratory 'founded in the richer, more philosophic and poetic discipline of political-panegyric discourse—symbolic and encomiastic'. What could prove otherwise is an explicit theory of judicial rhetoric, but Isocrates has left none. Even if the end of the *Against the Sophists* would have survived, it does not seem probable that it allowed, as Walker suggests, for a philosophic sort of forensic discourse.

links these, too, to the choice of subject, while attributing at the same time some moral importance to them. As the subject determines where the speech will be delivered, political matters give more opportunity for the speaker to show his talents in composing finely polished pieces than legal cases, which are usually discussed in a rather plain style.²⁹²

This survey of Isocrates' views highlights both the similarities with and the differences from those of Aristotle. In the *Rhetoric*, we find two different types of distinction between branches of rhetoric. One of these is a merely descriptive one, based on the theoretical identification of respective ends and time aspects for each branch. Underlying to that classification may be earlier doctrines of rhetoric (considered in the light of Platonic criticism) on the one hand and the observation of practice on the other.²⁹³ The other distinction, which is at least indirectly evaluative, is one between rhetorical situations, and Aristotle's question is how far judicial and deliberative settings allow for speaking *exō tou pragmatos*. In this aspect, deliberative rhetoric appears in a more favourable light than judicial rhetoric, yet this perspective is present only in the introduction. Throughout the rest of the work, Aristotle regards the three branches of rhetoric as parallel, and discusses them accordingly, from a descriptive rather than an evaluative perspective.

As for the criticism of what may be called the infrastructure of judicial rhetoric, Aristotle's opinion is much more restricted than that of Isocrates. While Isocrates' remarks reflect his concern with rhetorical *paideia*, thus involving the personality and skills of the orator as well as the moral influence of the speech on

²⁹² At 15.46–47, Isocrates highlights the similarity between 'panegyric' speeches and poetic compositions.

²⁹³ The relationship of Aristotle's judicial rhetoric with the practice of contemporary judicial oratory will be examined briefly in the next chapter.

the audience, Aristotle's perspective is focused on the role of proof. Thus, while he certainly thinks that popular courts are easily distracted by irrelevant arguments or emotional manipulation, and he concurs with Isocrates in saying that deliberative matters are more important than litigation, this does not result in the elimination or even marginalisation of judicial rhetoric.

Conclusion

Aristotle's views of rhetoric are quite often reconstructed in the light of Platonic doctrines. In the introduction of this chapter I touched upon the alleged connection between Aristotle's interest in rhetoric and his relationship with Plato's Academy. While I argued that such a connection is hard to establish on the basis of the biographical tradition, I am aware that such a negative claim does not by itself exclude the possibility that Aristotle was influenced by Plato's position concerning rhetoric, and his rejection of judicial rhetoric in particular. The lack of compelling biographical evidence (if there can be any kind of biographical evidence that is compelling in such matters), however, should make us aware that we cannot presuppose either that Aristotle consistently follows Plato in his assessment of rhetoric, or that he consistently departs from Platonic doctrine.

Both problems discussed in this chapter, the space allotted by Aristotle to legal argumentation and the comparison of the judicial and deliberative branches of rhetoric seem to be haunted by such presuppositions. Moreover, the conclusions to which they lead, i.e. that Aristotle would limit rhetorical argumentation in legal cases to the question of whether a certain act was done or not, and that he considers judicial rhetoric as less worthy of attention than the deliberative branch, seem to determine, at least in part, the answers given to further questions.

Thus, for instance, the strict limits imposed on legal argumentation in Book 1, Chapter 1 are sometimes compared to the discussion of ‘legal’ arguments in Chapters 10–15 of the same Book, with the outcome that either the inconsistencies in the text of the *Rhetoric*, or the contradiction between Aristotle’s theoretical views and his concessions to practice is highlighted. My contention, i.e. that Aristotle does not actually limit the task of the orator to the discussion of whether something happened or not, cannot and is by no means meant to explain away all the inconsistencies of the text.²⁹⁴ It does, however, show Aristotle’s overall project to be more consistent, which in turn suggests that looking for coherence in the *Rhetoric* and links between its specific parts is not necessarily futile. I shall attempt to do so among the legal arguments described in the last third of Book 1 in the next chapter.

As for the second problem, i.e. the relative merits of the different branches of rhetoric, the view that Aristotle prefers the deliberative to the judicial one may have shaped the belief, shared by several scholars, that he was not interested in the practical aspects of legal argumentation. Manifestations of this belief are, for example, the argument that the rarity of references to contemporary courtroom speeches in the *Rhetoric* shows that Aristotle did not consider the practical knowledge of judicial oratory important enough to be included in the curriculum,²⁹⁵ or that his lack of interest in the details of judicial rhetoric precludes that elements of later *stasis* theories are present in his work.²⁹⁶ My observations in the second part of this chapter suggest that there is no reason for attributing such

²⁹⁴ See e.g. Rapp (2002) vol. 1, 191–193 for a summary of what he terms ‘redaktionelle Unstimmigkeiten’.

²⁹⁵ See Trevett (1996).

²⁹⁶ See Liu (1991).

theoretical prejudices to Aristotle. Accordingly, it seems justified to devote part of the next two chapters to the re-examination of these questions.

Chapter 3: Arguments of Judicial Rhetoric in Aristotle

Introduction

After the reconstruction of Aristotle's general views on judicial rhetoric, we may now turn to the specific arguments of this branch, the material for which he discusses towards the end of Book 1 of the *Rhetoric*. This chapter seeks to analyse the structure of these arguments and to reconstruct the way they may function within legal reasoning. The arguments will be discussed in five groups, following their order of appearance in the *Rhetoric*. The first group of arguments is based on the material laid out in Chapters 10–12, and focuses on the mental element of wrongdoing. In the second place (Chapter 13.9–10), Aristotle briefly describes arguments based on the legal definition (*epigramma*) of specific unlawful acts. The third group (Chapter 13.11–19) comprises the description of, and material useful for, arguments from fairness. Arguments related to the common topic of magnitude (Chapter 14) do not belong to the specific arguments of judicial rhetoric strictly speaking, but will be discussed briefly, as they are described by Aristotle in connection with the judicial arguments proper. The same applies to non-technical proof (Chapter 15), which is outside of the threefold division of *logos*, but nevertheless important for legal argumentation. From this latter group, the topics related to the interpretation of laws are of particular interest for us here, as they are relevant for our understanding of arguments from fairness.

1 Definition and Reasons of Wrongdoing

Turning to the specific topics Aristotle offers for the speaker to use in judicial oratory (περὶ δὲ κατηγορίας καὶ ἀπολογίας, 1368b 1), we find that the first half of

the list (Chapters 10–12) is arranged in three groups. As Aristotle puts it, ‘One should grasp three things: first, for what, and how many, purposes people do wrong (τίνων καὶ πόσων ἔνεκα ἀδικοῦσι); second, how these persons are [mentally] disposed (πῶς αὐτοὶ διακεῖμενοι); third, what kind of persons they wrong and what these persons are like (ποίους καὶ πῶς ἔχοντας)’ (3–5, cf. 26–27, 1373a 37–38).

Before explaining what he means by ‘purposes’, Aristotle first gives a definition of wrongdoing, which, as we are going to see, governs his whole discussion of judicial arguments: ‘Let wrongdoing be [defined as] doing harm willingly in contravention of the law (ἔστω δὴ τὸ ἀδικεῖν τὸ βλάπτειν ἐκόντα παρὰ τὸν νόμον)’ (6–7). No general definition of law follows here, only the distinction between specific (ἴδιος) and common (κοινός) laws.²⁹⁷ For the term ‘willingly’, in turn, two criteria are given: the action has to be done ‘knowingly and unforced’ (εἰδότες καὶ μὴ ἀναγκαζόμενοι, 10).²⁹⁸ Knowledge in itself does not necessarily mean intention (‘willing’): the latter requires ‘deliberate choice’ (προαίρεσις), which includes both knowledge²⁹⁹ and the lack of compulsion. In a brief remark, Aristotle also explains that *prohairesis* stems from either vice (κακία) or moral weakness (ἀκρασία), and gives some examples of vices and the respective types of injustice (12–23). These may well serve as the basis for arguments from character, but as he says, they are treated in details elsewhere in the *Rhetoric* (cf. 1366a 23–

²⁹⁷ 1368b 7–9: λέγω δὲ ἴδιον μὲν καθ’ ὃν γεγραμμένον πολιτεύονται, κοινὸν δὲ ὅσα ἄγραφα παρὰ πᾶσιν ὁμολογεῖσθαι δοκεῖ.

²⁹⁸ On the standard use of the terms ἐκόν and ἄκων, see Rickert (1989). The distinction is formulated in a way similar to Aristotle’s in Plato’s *Laws* by the Athenian speaker at 861e 6–862b 6, see esp. 862a 2–7: οὐ γάρ φημι ἔγωγε, ὦ Κλεινία καὶ Μέγилле, εἴ τίς τινά τι πημαίνει μὴ βουλόμενος ἀλλ’ ἄκων, ἀδικεῖν μὲν, ἄκοντα μὴν, καὶ ταύτη μὲν δὴ νομοθετήσω, τοῦτο ὡς ἀκούσιον ἀδίκημα νομοθετῶν, ἀλλ’ οὐδὲ ἀδικίαν τὸ παράπαν θήσω τὴν τοιαύτην βλάβην, οὔτε ἂν μείζων οὔτε ἂν ἐλάττων τῷ γίγνηται.

²⁹⁹ 1368b 10–12: ὅσα μὲν οὖν εἰδότες, οὐ πάντα προαιρούμενοι, ὅσα δὲ προαιρούμενοι, εἰδότες ἅπαντα· οὐδεὶς γὰρ ὃ προαιρεῖται ἄγνοεῖ.

1368a 37 and 1378a 30–1388b 30).

Coming back to the reasons of wrongdoing, Aristotle makes clear what he means by them through a classification of possible causes of action (1368b 32–1369a 4). Of the seven causes,³⁰⁰ some (chance, compulsion, and nature) are not related to intention³⁰¹ and therefore cannot be used to establish wrongdoing. The presence of these, however, can be used to deny wrongdoing because of the lack of intention. The others (habit, reason, anger, and desire), in turn, are causes of intentional, and hence possibly unjust, actions. Actions motivated by these latter are, then, necessarily directed at something (real or apparent) good or pleasurable, which explains why Aristotle provides a list of pleasurable things as the first group of topics (good, or advantageous,³⁰² things having been discussed in connection with deliberative rhetoric in Chapter 6).

2 Pleasure, Wrongdoers and Victims

2.1 The Mental Element

The way the topics related to pleasure can be used in a judicial speech is explained at the beginning of the discussion: ‘it is clear that the prosecutor should consider, as they apply to the opponent, the number and nature of things that all desire when they do wrong to their neighbours, and the defendant should consider what

³⁰⁰ 1369a 5–7: πάντα ὅσα πράττουσιν ἀνάγκη πράττειν δι’ αἰτίας ἑπτὰ, διὰ τύχην, διὰ φύσιν, διὰ βίαν, δι’ ἔθος, διὰ λογισμόν, διὰ θυμόν, δι’ ἐπιθυμίαν.

³⁰¹ See 1368b 32–37: πάντες δὴ πάντα πράττουσι τὰ μὲν οὐ δι’ αὐτοὺς τὰ δὲ δι’ αὐτούς. τῶν μὲν οὖν μὴ δι’ αὐτοὺς τὰ μὲν διὰ τύχην πράττουσι τὰ δ’ ἐξ ἀνάγκης, τῶν δ’ ἐξ ἀνάγκης τὰ μὲν βίᾳ τὰ δὲ φύσει, ὥστε πάντα ὅσα μὴ δι’ αὐτοὺς πράττουσι, τὰ μὲν ἀπὸ τύχης τὰ δὲ φύσει τὰ δὲ βίᾳ, with 1369b 20–21: ὅσα δι’ αὐτοὺς ἐκόντες πράττουσιν, οὐχ ἐκόντες δὲ ὅσα μὴ δι’ αὐτούς.

³⁰² At 1369b 19–20 and 22–23, Aristotle speaks of ἀγαθὰ, while at 28, he refers to deliberative topics where those περὶ τοῦ συμφέροντος are discussed. Cf. 1369b 7–8: διὰ λογισμόν δὲ τὰ δοκοῦντα συμφέρειν ἐκ τῶν εἰρημένων ἀγαθῶν, and 1363b 3–4: περὶ μὲν οὖν ἀγαθοῦ καὶ τοῦ συμφέροντος ἐκ τούτων ληπτέον τὰς πίστεις.

and how many of these do not apply' (1368b 29–32).³⁰³ What this group of topics can help the speaker to do, then, is persuading the judges that the defendant did (or did not) have a motive to commit a certain unjust action, thus making it probable (or improbable) that he committed it willingly.

The lists of typical characteristics of wrongdoers and their victims serve a similar aim: by showing that the defendant or the person wronged belongs (or, for the other party of the debate, that he does not belong) to one of the groups mentioned by Aristotle, the speaker may prove the probability of his claim that the defendant did (or did not) intend to commit a certain wrongful action. Here again, both sets of topics are related to intention. Aristotle introduces them with the following general explanation:

Now, then, [people do wrong] whenever they think that something can be done and that it is possible for themselves to do it – if, having done it, they will not be detected or if detected, will not be punished or will be punished but the penalty will be less than the profit to themselves or to those for whom they care. (1372a 5–9)

It should be noted that in the passage quoted Aristotle does not speak about possibilities in themselves but about what people *think* about possibilities. The question of possibility, being a common topic, is then put aside until Book II, and the focus is on the considerations of the prospective wrongdoers. Thus, the mental dispositions of the perpetrators, the characteristics of the victims and the wrongful actions are all looked at from that perspective. What happens here, then, is that Aristotle takes a part of the rhetorical tradition, arguments concerning the mental element of wrongdoing, and fits it into his own framework of judicial rhetoric. This can be well illustrated by the following brief comparison with a similar argument described in Book II of the *Rhetoric*.

³⁰³ This apparently refers to the list of pleasurable things only and does not include the classification of the causes of action, for there it may be worth considering for the defendant whether his action can be explained with chance, compulsion, or nature, i.e. causes that exclude intentionality.

2.2 The Wrongdoer's Considerations

In Book II of the *Rhetoric*, the discussion of 'fallacious topics', i.e. the ones used to construct apparent enthymemes, includes certain probability arguments. It is among these that Aristotle mentions a type of argument that is based on 'what is not generally probable but probable in a particular case' (παρὰ τὸ ἀπλῶς καὶ μὴ ἀπλῶς). This, Aristotle explains, is frequently used in eristics, where 'not adding the circumstances and references and manner makes for deception' (1402a 15–16).

The (judicial) example given for this topic may be familiar from Plato's *Phaedrus* as well:³⁰⁴

If a weak man were charged with assault, he should be acquitted as not being a likely suspect for the charge; for it is not probable. And if he is a likely suspect, for example, if he is strong; for it is not likely for the very reason that it was going to seem probable. [...] Both alternatives seem probable, but one really is probable, the other so not generally, only in the circumstances mentioned. And this is 'to make the weaker seem the better case'. (1402a 19–24)

The first kind of situation, i.e. a weak man attacking someone is similar to that mentioned by Plato's Socrates, and constitutes an *eikos* argument *par excellence*.

The second kind of argument, in turn, is based not on what is probable in itself, but on the probability of the alleged perpetrator's consideration of what would seem probable in general. That latter is another example of what we find in Book I, where the characterisation of perpetrators, victims, and wrongful actions consistently focuses on the question of whether the perpetrator could reasonably think he can commit a specific action and then either avoid prosecution or at least

³⁰⁴ Plato attributes it to Teisias (273 a 7–b 1, c 7–9), whereas Aristotle writes that 'the *Art* of Corax is made up of this topic' (1402a 17–18). This may suggest that Aristotle knew it from an independent source, but also that the *technē* of Corax and that of Teisias were regarded as essentially the same in their content. Apart from the sources credited with the example, the difference between Plato's and Aristotle's versions is that the latter emphasises the *dissos logos* character of this type of argument, and includes the defendant's considerations concerning the action (much like those described at 1372a 5–9), while the former focuses on the claim that *eikos* arguments are just incompatible with telling the truth.

have a chance of lenient consideration by the court. Thus, while Aristotle is clearly acquainted with the various probability arguments, when dealing with topics that belong to judicial rhetoric he narrows the scope of possible topics to those that relate to his definition of wrongdoing which stands at the beginning of the whole discussion (1368b 6–7), and focuses on the mental element rather than the question of probability in terms of the facts of the case.³⁰⁵

3 Just and Unjust Actions

Chapter 13 begins with a recapitulation of the classification of just and unjust actions, with further distinctions made in terms of the law (that is violated by the action) and the persons (who are harmed by it). As for the law (1373b 4–18a), it is either specific or common, and either written or unwritten. Specific laws, written or unwritten, belong to a certain political community in the sense that they are made by it, which also determines their sphere of validity. It is this kind of laws which the arguments discussed in the chapter are referred to, following the distinction between written and unwritten laws.³⁰⁶ Common laws, in turn, can be

³⁰⁵ The material collected in Chapters 10–12 can, of course, be used in probability arguments that have the following structure: (1) people generally commit injustice in the situation/mental state X, (2) the defendant was (or was not) in the situation/mental state X, (3) the defendant is likely (or unlikely) to have committed injustice. A look at the evidence of Greek oratory confirms that in practice arguments from probability appear in a wider range than that of intention, but also that the perpetrators' considerations and attitudes make the major part of the circumstances: see Kuebler (1944), and more recently Hoffman (2008), with a select bibliography of previous scholarship at pp. 1–2, note 1, and an overview of the use of *eoika* in a selection of texts including the speeches of Antiphon, Lysias, and Isocrates. In Chapters 10–12, however, unlike in Book II, the emphasis is on the mental element, which is going to appear in arguments from definition and fairness, too. See also Hoffman (2008) 22, stating that '[w]hile *eikos*-based judgments about past occurrence, and the truth of accounts thereof, most frequently concern whether a person's actions "fit the profile" of what a certain type of character would do in a given situation, occasionally *eikos* is pushed beyond the realm of social expectation to form a judgment on the basis of what is typically true of the world.' What is peculiar in Aristotle's judicial arguments against the background of Hoffman's analysis is that they focus exclusively on the moral 'profile' of the alleged perpetrator.

³⁰⁶ Kennedy (1991) 102 rendered the sentence λέγω δὲ νόμον τὸν μὲν ἴδιον, τὸν δὲ κοινόν, ἴδιον μὲν τὸν ἐκάστοις ὁρισμένον πρὸς αὐτούς, καὶ τοῦτον τὸν μὲν ἄγραφον, τὸν δὲ γεγραμμένον, κοινὸν δὲ τὸν κατὰ φύσιν (1373b 4–6) as 'I call law on the one hand specific, on the other hand common, the latter being unwritten, the former written [...]', in order 'to avoid inconsistency with 1.10.3' (ibid).

traced back to a general principle of justice, which is natural, and are therefore recognised by and valid for everyone, regardless of legislation. While these laws are of enormous importance for moral philosophy, they play a marginal role in legal argumentation and will be mentioned only among the possible topics of arguments directed against the application of written laws (cf. 1375a 27–29 and 31–33).

It is also law, Aristotle continues, that makes a distinction between duties to the community (πρὸς τὸ κοινόν) and duties to individuals within the community (πρὸς ἓνα τῶν κοινωνούντων) (1373b 18a–24). This distinction, which is not further elaborated on,³⁰⁷ covers the dichotomy of ‘public’ and ‘private’ wrongs, also reflected by the procedural categories of δίκη and γραφή in Athenian law.³⁰⁸

The final distinctions of the introduction highlight the conceptual importance of voluntary action (27–29, 32–36), and signal the links to other parts of the book, where further relevant concepts are discussed in detail, together with the related topics.³⁰⁹

These introductory remarks provide a map, as it were, to the topics of the chapter. Actions that are just/unjust according to written law are discussed under the heading of *epigramma*, while *epieikeia* covers (part of) those related to unwritten law.

note 227). Such a modification is, however, misleading because it may lead to an interpretation of 1374a 18–26 that associates arguments from fairness (which Aristotle links to unwritten law) with common, rather than specific, laws. Kennedy (2007) 97 follows the distinctions of the original.

³⁰⁷ It is not mentioned among the topics of magnitude (Ch. 14) either, as the focus is on the injustice underlying the wrongdoing. In forensic oratory, however, public interest is often referred to in order to amplify the graveness of the defendant’s action: see e.g. Isocr. 20.2, where the speaker argues that *hybris* differs from other charges in terms of procedure, ὥς κοινοῦ τοῦ πράγματος ὄντος.

³⁰⁸ Kennedy (2007) 97, note 230, rightly points out that this dichotomy is not an exact equivalent of the modern one of civil and criminal law.

³⁰⁹ Anger (θυμός) in Book II, Ch. 2 (using the word ὀργή rather than θυμός: Kennedy (2007) 98, note 233); objects of deliberate choice (ποῖα δὲ προαιρούνται) and dispositions (πῶς ἔχοντες) in the preceding chapters.

4 Legal Definition

Having finished the classification of just and unjust actions at the beginning of Chapter 13, Aristotle turns to the topics that may serve as sources of arguments for each case. The first topic he discusses is related to written law,³¹⁰ and it covers the situation where it is not the facts but their legal categorisation that is at issue.

‘[P]eople often admit having done an action and yet do not admit to the specific terms of an indictment (τὸ ἐπίγραμμα) or the crime with which it deals’ (1373b 38–1374a 2), Aristotle states, and gives six examples where the defendant proposes a description of his action which is different from what stands in the written plea, i.e. one excluding the element that makes a certain action a specific crime (1374a 2–6). In some of the cases, the description refers to something that is not unlawful in itself (as e.g. λαβεῖν or συγγενέσθαι, as opposed to κλέψαι and μοιχεῦσαι, respectively), while in others the distinction is between two different crimes (e.g. κλέψαι and ἱεροσυλῆσαι).

The topic to be used in such situations is that of definition,³¹¹ and Aristotle suggests that the orator should be able to give definitions of crimes³¹² in order to show whether the legal term applies (or not) to the action admitted, thus shedding light on *to dikaion* (1374a 6–9).

Arguments based on competing legal terms do occur in Attic oratory. One example may be the opposition of sexual intercourse and adultery appearing in the Pseudo-Demosthenic *Against Neaera* (67), where a man is said to have admitted the

³¹⁰ As Aristotle states retrospectively at 1374a 18–20: ἐπεὶ δὲ τῶν δικαίων καὶ τῶν ἀδίκων ἦν δύο εἶδη (τὰ μὲν γὰρ γεγραμμένα τὰ δ’ ἄγραφα), περὶ ὧν μὲν οἱ νόμοι ἀγορεύουσιν εἴρηται κτλ.

³¹¹ Cf. *Top.* 101b 38–102a 17.

³¹² Kennedy (2007) 98 understands διωρίσθαι as giving definitions in the speech, which does happen in Attic oratory. Rapp (2002) vol. 2, 498 *ad* 1373b 38–1374a 9 (3) emphasises the formulation of definitions while preparing for the speech, with reference to Aristotle’s advice to the dialectician at *Top.* 105b 25–29.

former (ὡμολόγει μὲν χρῆσθαι τῇ ἀνθρώπῳ) but denied the latter (οὐ μέντοι μοιχὸς γε εἶναι), as the woman was not the daughter of the defendant but a prostitute.³¹³

There seems to have been some space for such arguments, as Athenian laws sometimes did not define the terms they used,³¹⁴ and even when they did, that did not in itself prevent the litigants from offering unusual interpretations, since pleas were admitted to the courts as long as they featured the key terms used by the legislator.³¹⁵

What makes Aristotle's discussion particularly interesting is that he connects the problem of definition to moral character: 'In all such cases the question at issue relates to whether a person is unjust and wicked or not unjust; for wickedness and being unjust involve deliberate choice, and all such terms as "violent assault" and "theft" signify deliberate choice' (1374a 9–13). Thus, the mere physical action qualifies as a certain crime only if it is done for a specific reason (εἰ ἔνεκά του), and it is that reason that has to be stated in a definition as the *differentia specifica* that involves criminal responsibility.³¹⁶

Here again, a parallel from the list of 'apparent topics' in Book II, Chapter 24 may be helpful in substantiating this claim. A fallacious generalisation, Aristotle

³¹³ Cf. Grimaldi (1980) 295 *ad* 1374a 3 (2), quoting Spengel (1867). Interestingly, according to the speaker the plaintiff (who had been accused of adultery by Stephanus and then brought a charge against him for unlawful imprisonment, see *Against Neaera* 66) also argued that the law οὐκ ἔξ ἐπὶ ταύτησι μοιχὸν λαβεῖν ὅποσαι ἂν ἐπ' ἐργαστηρίου καθῶνται ἢ πωλῶνται ἀποπερασμένως, and that Stephanus' home actually qualified as an ἐργαστήριον of prostitution (67). This shows that an argument may build up from multiple definitions. See also Harris (2013a) 120–121.

³¹⁴ Cf. Sickinger (2008) 110, but also *ibid.* 100, pointing out that '[t]he Athenians and the fellow Greeks were well aware of the indeterminate qualities of written laws, and they sometimes took active, legislative steps to mitigate inconsistency, ambiguity, and conflict.' Sickinger's arguments are complemented with further evidence by Rubinstein (2008). See also Harris (2013a) 209–210, also emphasising that there may have been a wide consensus concerning the meaning of most legal terms, and Harris (2009/10) section iv, for a survey of definitions given in Athenian statutes. All these contributions nuance the picture offered by Ruschenbusch (1957).

³¹⁵ Cf. Harris (2013a) 115–125, and 209–212.

³¹⁶ See 1374a 13–16: οὐ γὰρ εἰ ἐπάταξεν πάντως ὕβρισεν, ἀλλ' εἰ ἔνεκά του, οἷον τοῦ ἀτιμάσαι ἐκείνον ἢ αὐτὸς ἡσθῆναι. οὐδὲ πάντως, εἰ λάθρα ἔλαβεν, ἐκλεψεν, ἀλλ' εἰ ἐπὶ βλάβῃ <τοῦτου ἀφ' οὗ ἔλαβε> καὶ σφετερισμῷ ἐαυτοῦ.

writes, can be made through the ‘omission of consideration of when and how’ (παρὰ τὴν ἔλλειψιν τοῦ πότε καὶ πῶς). He then gives two examples. The first one is as follows: ‘Alexander took Helen justly; for free choice has been given to her by her father. For presumably, not for all time, only for the first time; for the father’s authority only lasts to that point’ (1401b 34–1402a 1). The second one is even more closely relevant: ‘[I]f someone were to say that it is *hybris* to beat those who are free; for it is not always true, only when someone strikes the first blow’ (1402a 1–3). This is clearly a case of definition, but one without reference to intention. We remember that in Book I, the distinction between *hybris* and ‘striking the first blow’ was made in the following way: ‘[I]f someone has struck another it does not in all cases mean he has “violently assaulted” him, but [only] if he has done so for a certain reason, such as to dishonour him or to please himself’ (1374a 13–15). What makes for a specifically judicial topic is, then, that it focuses on the question of intention, in accordance with Aristotle’s definition of wrongdoing.

Interestingly, however, in some of Aristotle’s examples of legal definitions it is not the purpose that seems to be the criterion, although he apparently considers the principle as applying to all cases of definition.³¹⁷ In the two examples given, *hybris* and theft, Aristotle explains what the specific reasons are.³¹⁸ Of the other four cases, however, it is only treason where an obvious purpose can be discovered. Adultery, trespass on state property and sacrilege, in turn, differ from their respective counterparts in terms of their objective circumstances: adultery is sexual intercourse with someone else’s wife or daughter,³¹⁹ while in the cases of trespass and theft it is the question of ownership that makes the difference, as it is explicitly

³¹⁷ See 1374a 17: ὁμοίως δὲ καὶ περὶ τῶν ἄλλων ἔχει ὥσπερ καὶ περὶ τούτων.

³¹⁸ See n. 316 above.

³¹⁹ On the definition of adultery in Athenian law, see Carey (1995) 407–408, who follows Paoli (1950) against Cohen (1984, 1991) and Todd (1993) 276–277.

stated for sacrilege/theft (οὐ γὰρ θεοῦ τι, 1374a 4–5). A possible explanation is that Aristotle is actually speaking here of the perpetrator’s attitude to the circumstances of his action, i.e. whether his knowledge included information concerning the marital status of the woman he was having intercourse with, the ownership of the land trespassed upon, or of the thing stolen.³²⁰ If this is the case, then Aristotle tacitly assumes here that the intention to commit a specific crime (e.g. to trespass on *public* land) is necessarily motivated by a respective purpose, and excludes the possibility of someone doing something knowingly, i.e. aware of all the qualificatory circumstances (e.g. that the land is public property) but without a purpose connected to those very circumstances.³²¹ An example for the latter may be someone stealing sacred things from a temple, being aware of the special status of the stolen goods, but being motivated by greed rather than the fact that the goods belong to the god. Such an act, to be sure, would still need *prohairesis* on the one hand and display an unjust character on the other. Still, it seems that Aristotle is looking at this group of actions from the perspective of the legislator rather than the perpetrator, for even if the latter does not commit something *because of* the qualificatory circumstances, the former makes something a separate crime in order to protect the values or interests circumscribed by those circumstances.³²²

The topic of legal definition, then, focuses on written law and how far the text can be taken to cover human actions. To make an argument from this topic, the orator has to examine the conceptual elements of a legal definition to see whether a competing description of the facts of the case can be given by omitting one or more

³²⁰ See Rapp (2002) vol. 2, 497 *ad* 1373b 38–1374a 9 (1).

³²¹ Cf. Rapp (2002) vol. 2, 498–499 *ad* 1374a 9–17.

³²² The Athenians’ approach to rape and adultery may be a good example: while Western law today punishes rape because of the violation of the victim’s rights to sexual autonomy, in Athenian law it was regarded as a violation of the *timē* of the victim’s father or husband, just like adultery. See Harris (2004c).

of these elements. This links the topic to the material collected in Chapters 10–12, since Aristotle approaches these arguments from the perspective of intention, and even the objective circumstances that may appear as elements of the definition have to find their way into an argument through the question of *prohairesis*. As we are going to see next, something similar goes on in the case of arguments from fairness, too.

5 Fairness

The general classification of just and unjust deeds (1373b 1–6), we have seen, is intended to serve as an outline of the possible topics of arguments useful in judicial speeches, where the *telos* of rhetoric is persuasion about lawfulness. Some of these deeds, Aristotle writes (1374a 20–26), are just or unjust (lawful or unlawful) according to unwritten laws, and these can be divided in two groups: those resulting from a high level of virtue or vice (καθ' ὑπερβολὴν ἀρετῆς καὶ κακίας), which are regulated by social norms other than written law,³²³ and those related to some shortcoming of a particular written law (τοῦ ἰδίου νόμου καὶ γεγραμμένου ἔλλειμμα). In the second case, however, it should be regulated by the written law of a specific political community, but the respective law somehow fails to provide the adequate rules. Fairness is a kind of justice applicable to the latter kind of situation: it is justice beyond written law (τὸ παρὰ τὸν γεγραμμένον νόμον δίκαιον, 1374a 27–28).

³²³ Cf. Harris (2013b) 30. Grimaldi (1980) 298 *ad* 1374a 21 may be right in pointing out a possible link with 1375a 15–17 (on which see sect. 7.1 below). Another aspect of this kind of unwritten law in terms of wrongdoing may be referred to by arguments explaining the lack of relevant regulations for a certain situation with the extraordinary character of the act committed. See e.g. Lys. 31.27, where the speaker argues that the defendant's behaviour is not explicitly forbidden by law because διὰ τὸ μέγεθος τοῦ ἀδικήματος οὐδεὶς περὶ αὐτοῦ ἐγράφη νόμος. Further examples (Lys. 14.4; Lycurg. *Against Leocrates* 9) are given by Usher (1999) 79, note 95, who only remarks that this topic is not mentioned by Aristotle's discussion of laws as *pistis atechnos* in Chapter 15.

The interpretation of Aristotelian fairness (*to epieikes*) has always been a favourite topic of legal philosophers and legal historians alike. For both groups, it is important as the opposite of the strict application of the law. Philosophers therefore mostly study it as a historical example of legal decisions being based on moral considerations rather than positive law. For legal historians, the same problem appears as the question of whether Athenian (or ancient Greek) law did recognise grounds of judicial decisions outside of written law. While both approaches have proven fruitful in providing new insights for legal history and philosophy, the following discussion looks at fairness primarily from a rhetorical perspective, focusing on how arguments from fairness function in legal argumentation.

Starting from (1) a brief reconstruction of the concept of fairness on the basis of Chapter 5.10 of the *Nicomachean Ethics*, this section (2) compares Aristotelian and Platonic fairness. The analysis of the relevant passages of the *Rhetoric* follows in two parts: (3) first the conceptual summary and the example (1374a 26 –b 1) given by Aristotle are examined to map the structure of *epieikeia* arguments, then (4) the links between these arguments and the list of *epieikeia*-related topics (1374b 2–22). The last question raised is (5) whether arguments from fairness include those put forth in favour of an extensive interpretation of the law (based on analogy). It is with that question in mind that the final part (6) takes a look at Athenian oratory, to see whether such arguments follow the patterns of ‘ordinary’ *epieikeia* arguments.

5.1 Fairness in the *Nicomachean Ethics*

In the *Nicomachean Ethics*, we find the most detailed discussion of *epieikeia* in Book 5, Chapter 10 (1137a 31–1138a 3), as an excursus between problems related to the

notions of ‘being treated unjustly’ and ‘acting unjustly’.³²⁴ Aristotle approaches the topic through the ambiguity of the usage of the term *epieikes*:

sometimes we praise the reasonable and the corresponding man, in such a way that we transfer the term to other features we are praising, too, in place of ‘good’ [...] while at other times it appears odd [...] that the reasonable should be something praiseworthy when it is something that runs counter to what is just. (1137a 35–b 4)

The solution of the problem comes from another ambiguity: that of the term ‘just’. In one sense, ‘just’ means ‘legally just’, and it is in this sense that *epieikeia* ‘runs counter to what is just’ and ‘is better than what is just in one sense’. In a more general sense, however, what is just comprises what is *epieikes* (1137b 8–11). The reason for the ambiguity is that while laws aim at justice by their nature (see 1129b 14–24), they may still lead to unjust decisions in individual cases and may need rectification through *epieikeia*:

The cause of this is that all law is universal, and yet there are some things about which it is not possible to make universal pronouncements. So in the sorts of cases in which it necessarily pronounces universally, but cannot do so and achieve correctness, law chooses what holds for the most part, in full knowledge of the error it is making. (1137b 13–16)

It is in those cases, i.e. where a general rule fails to take the particular circumstances of a given case into account, that *epieikeia* can play a role in the application of law:

on these occasions it is correct, where there is an omission by the lawgiver, and he has gone wrong by having made an unqualified pronouncement, to rectify the deficiency by reference to what the lawgiver himself would have said if he had been there and, if he had known about the case, would have laid down in law. (1137b 21–24)

Aristotle emphasises that such cases do not result from intellectual errors made by the legislator, nor do they indicate the technical deficiency of a piece of legislation. Rather, they are inevitable consequences of the tension between the universality of the law and the singularity of human actions (see 1137b 17–19).³²⁵ A

³²⁴ Cf. 1136a 10–11. The two problems are ‘whether we should suppose the person acting unjustly to be the one who assigned the larger share contrary to desert, or the one who has it; and whether it is possible to treat oneself unjustly’ (1136b 15–17).

³²⁵ He also adds that there is another means of regulation, the decrees, which allow for a greater

related, and equally important, point he makes is that ‘rectification’ does not mean denying the validity of the law, but has to be made with reference to the legislator’s intention.

Thus, although Aristotle is aware that legislation may contain errors,³²⁶ *epieikeia* is not meant to correct that sort of deficiency by amending the law.³²⁷ Its purpose is to bring about justice in the individual case, thus fulfilling the actual intention of the legislator. Consequently, it works through the interpretation of the law rather than against the law.³²⁸

5.2 *Epieikeia* in Plato

Aristotle’s observation that legal regulation in itself cannot provide adequate grounds for decision in each particular case is strikingly similar to what the Stranger says in Plato’s *Statesman*:

[L]aw could never, by determining exactly what is noblest and most just for one and all, enjoin upon them that which is best; for the differences of men and of actions and the fact that nothing, I may say, in human life is ever at rest, forbid any science whatsoever to promulgate any simple rule for everything and for all time. [...] But we see that law aims at pretty nearly this very thing, like a stubborn and ignorant man who allows no one to do anything contrary to his command, or even to ask a question, not even if something new occurs to some one, which is better than the rule he has himself ordained. (294a 10–c 4)

In the *Statesman*, the conclusion is not formulated with regard to the judge but to the legislator, i.e. the ruler of the state. Laws, imperfect as they are, serve as general instructions for cases where the ruler cannot make a decision himself. In those cases, however, where he is present, he must be allowed to overrule these

flexibility on the part of the legislator. As decrees are made for individual cases rather than generalised types of behaviour, they do not have to provide rules for an infinite number of cases. See 1137b 27–32.

³²⁶ Although it is clear that the law can contain genuine errors, see 1129b 24–25: ὁρθῶς [sc. κελεύων/ ἀπαγορεύων] μὲν ὁ κείμενος ὁρθῶς, χεῖρον δ’ ὁ ἀπεσχεδιασμένος.

³²⁷ Pace Hurri (2013) 154. Cf. also Saunders (2001) 80, and *ibid.* note 29, mentioning the possibility of ‘a piecemeal modification’, with reference to Brunschwig (1980) 525–526; further Mirhady (1990) 395 on the judges acting as legislators.

³²⁸ See Brunschwig (1996) 140, and, more explicitly, Harris (2013b) 28.

general instructions, for his personal expertise and ability to consider all the circumstances will probably lead to better decisions than the legal rule would in itself.³²⁹

It is only in the *Laws* that Plato addresses the same problem with reference to the application of law, apparently accepting the fact that the legislator cannot be present everywhere to adjudicate legal disputes, and that therefore judges need to be authorised to exercise a certain level of discretion. What exactly this level should be depends on the skills of the judges concerned. The establishment of the facts is necessarily subject to judicial deliberation, for the facts of the individual case cannot be legislated upon in advance. Yet the Athenian speaker seems to be quite confident that in Magnesia, the city to be founded along the lines set by the dialogue, there will be a citizenry that can provide competent judges who can be left to decide some other questions as well. Concerning penalties, for example, the Athenian says that ‘the judge must assist the lawgiver in carrying out this same task, whenever the law entrusts to him the assessment of what the defendant is to suffer or pay, while the lawgiver, like a draughtsman, must give a sketch in outline of cases which illustrate the rules of the written code’ (934b 6–c 2). The sketch that follows is, however, a fairly detailed one: Plato apparently seeks to eliminate from Magnesian legislation much of the ambiguity present in its Athenian counterpart.³³⁰

But can judges in Magnesia go beyond written law in order to reach a more just verdict? It seems that there is at least one type of affairs where they can. One

³²⁹ This is in accordance with what Socrates says about writing (of which legislation is an instance) in the *Phaedrus* (see 275d 4–e 5, 278b 9–d 1).

³³⁰ See Harris (2013a) 205–209. Cf. also the remark made by Saunders (2001) 87: ‘Not only will the gaps be fewer, but the actual laws will be far less open-ended conceptually; for the Magnesian citizen is conditioned not merely by an intensive educational process but by the frequent legal preambles: he will have fairly firm ideas about what (say) justice, virtue, heresy, good and bad artistic standards, really *are*’.

of the Magnesian laws provides that in case a father dies having a daughter but no (natural or adopted) son, the male relative who comes next in the order defined by the law has to marry the daughter (924e 3–925a 2). The legislator, however, has to take into account the possibility that the prospective heir cannot marry the daughter because of her physical or mental illness (925d 5–e 5, 926b 2–6). Such cases have to be adjudicated by a panel of arbitrators (*diaitētai*) who are allowed to grant exemption from the legal obligation (926a 6–7, b 7–d 2).

Arguably, this is a case of *epieikeia*, albeit Plato does not use the term for it.³³¹ We see the tension between the law formulated in universal terms and the circumstances of the individual case (925d 8–e 2); the preamble to the law asks for *συγγνώμη* on behalf of both the legislator (for his inability to consider individual cases) and the persons asking for exemption (for their inability to obey the command of the law) (925e 6–926 a 3); and in the procedure reference has to be made to the legislator's intent (926c 2–4). This makes clear that fairness is not directed against the validity of the law and that it actually serves the good of the political community better than a strict enforcement of the general rule.

What makes this kind of fairness interesting (and characteristic of Plato's Magnesia) is that, as Trevor Saunders put it, 'the need for it is recognised, but only in rare and extreme cases; and its operation is taken clean out of private hands and transferred to senior officials who act on criteria subserving the public interest. [...] To put the point in a lapidary manner, Plato has nationalised a private virtue'.³³² This is essentially the same as what happens to rhetoric in Magnesia: it is taken

³³¹ See Saunders (2001) 84–86, with some qualifications based on certain differences between the typical form of *epieikeia* and Plato's description of the situation.

³³² Saunders (2001) 92.

over by the legislator and subordinated to the interest of the state.³³³

5.3 Fairness and Definition in the *Rhetoric*: Aristotle's Example

Coming back to Aristotle, we may now see how the very fact of including the discussion of *epieikeia* signals an important departure from Plato's doctrine.

Unlike in the *Nicomachean Ethics*, where he speaks about the legislator's awareness of the problems caused by the inevitable generality of legislation, in the *Rhetoric* Aristotle mentions two possibilities:³³⁴ shortcomings in written law may be either due to the ignorance of the legislator, or on the contrary, brought about by him through the deliberate use of general terms and the lack of distinctions. He then gives an example for the collision of a strict interpretation of written law and fairness, resulting from the inevitable lack of complete conceptual determination in normative texts:

In many cases it is not easy to define the limitless possibilities, for example how long and what sort of weapon has to be used to constitute 'wounding', for a lifetime would not suffice to enumerate the possibilities. If, then, the action is undefinable when a law must be framed, it is necessary to speak in general terms, so that if someone wearing a ring raises his hand and strikes, by the written law he is violating the law and does wrong, when in truth he has not done any harm and this (judgement) is fair. (1374a 31–b 1)

³³³ It should be noted that this kind of *epieikeia* does not serve justice directly. The aim of the legislator is, rather, to avoid enforcing the law in cases where its addressees would prefer to suffer punishment, as the law cannot fulfil its function of guiding human actions in those cases, and even if they obeyed would not serve the public interest. It could be argued, however, that the exception serves justice indirectly, as it would be unjust to punish those who decline to obey the law only because obeying it would be worse than suffering whatever punishment (cf. 925e 2–5), which amounts to some kind of a necessity (cf. 926a 2–3: οὐ δύνανται προστάγματα τελεῖν).

³³⁴ Kraut (2002) 108, note 17. In his opinion, the reason why Aristotle does not examine the possibility of the legislator's ignorance may be that 'voluntary errors' (i.e. where the legislator is aware of the shortcoming of the text he drafted) are of 'greater theoretical importance'. It seems, however, that it simply makes no difference for the argument of the *Nicomachean Ethics* how the shortcoming comes about (and cf. 1129b 24–25, quoted above in n. 30). Moreover, it seems that the possibility of ignorance is implicitly present in Aristotle's formulation where he speaks of the legislator's presumable intention ('had he known', *EN* 1137b 23). Aristotle does not seem to attribute much importance to the distinction between the two possibilities in the *Rhetoric* either. While it certainly makes a difference whether the orator blames the legislator for the incompleteness of a legal provision or states that legal provisions necessarily have an 'open texture' (on that notion see sect. 5.3.1 below), this difference is related to the emotional effects of the speech (i.e. the *pathos*) rather than the argument (the *logos*) itself. See, however, Rapp (2002) vol. 2, 502–503.

In the introductory chapter of the *Rhetoric*, Aristotle has already pointed out the limits of the legislator's competence in terms of questions of fact (1354b 11–16). Here, however, he goes one step further, asserting that even if the legislator has got a definite intent (in the example it may be that people should refrain from assaulting others with weapons made of iron), its formulation as it appears in the written text is likely to be imperfect. Therefore, the argument can be made before the court that in addition to applying the rule previously given to the particular facts of the case, the judges also have to establish what provisions the text of the law actually contains. The result of their examination of the rule may contradict what is generally understood to be the 'ordinary meaning' of the text. Of course, the speaker need not highlight that this is what happens in the court: rather, he may propose a reading of the text as the one that genuinely reflects the intention of the legislator.

Arguments from the legislator's intent have a twofold character. On the one hand, they exemplify what are often termed 'consequentialist arguments.' As Jacques Brunschwig puts it in his interpretation, 'there exists a perfectly applicable law, but [...] a mechanical or blind application of it would be too severe according to the moral intuitions of the judge and those of the society in which he works.'³³⁵ Consequently, the argument is based on the assertion that the legislator would not have intended the law to lead to such a verdict. On the other hand, the legislator's intent is still something referred to in 'rule-based reasoning', where it appears as a means of interpretation, which is intended to help establishing the meaning of a normative text, by explaining how the legislator actually meant what he put into words. What is important for us to see here is that this method of reasoning – i.e.

³³⁵ Brunschwig (1996) 139, following Shiner (1987).

advocating fairness by way of interpreting the text – makes it possible for the orator to avoid questioning the authority of written law.

We have seen that in the *Nicomachean Ethics* Aristotle emphasises the link between the ‘correction’ of the law and the legislator’s intention (which also appears among the topics of fairness listed later in Chapter 13). The problem here is, apparently, that whatever one thinks about the legislator’s writing skills, the most obvious way of knowing his intention is still to read the text of the law. Thus, arguments for a ‘not-so-ordinary’ meaning of the text have to face a good deal of scepticism. This kind of scepticism is well illustrated by a quotation from L. L.

Fuller’s fictitious *The Case of the Speluncean Explorers*, in which a judge says that

[t]he process of judicial reform requires three steps. The first of these is to divine some single ‘purpose’ which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the different classes of its sponsors. The second step is to discover that a mythical being called ‘the legislator,’ in the pursuit of this imagined ‘purpose,’ overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. *Quod erat faciendum*.³³⁶

What, then, remains of *epieikeia* for arguments that can be safely used in a speech without appearing to be seeking ‘to be wiser than the laws’ – to use the words of Aristotle (1375b 23–24)? It may be a good idea to come back to the example Aristotle gives for using fairness in a particular case of judging an offence. ‘[I]f someone wearing a ring raises his hand or strikes, by the written law he is violating the law and does wrong.’ Here the discrepancy between the law and the truth is due to the fact that the law does not define ‘how long and what sort of weapon has to be used to constitute “wounding”’. The law, as far as it can be reconstructed from Aristotle’s words, forbids and punishes assault with iron. In the

³³⁶ Fuller (1949) 634. It should be noted, however, that in Athenian legal discourse the legislator is never regarded as a ‘mythical being’, although the historical identity of legislators is not examined either. References to the legislator are rather used to attribute a single intention to the law of the polis, cf. Harris (2000) 50–51.

case someone strikes another person with an iron ring on his hand, the conceptual requirements for applying the law obtain and the action qualifies as ‘wounding’. In such a case, applying the sanctions of wounding would lead to injustice, as it would mean treating different actions (e.g. deliberately using a sword and wearing a ring) in the same way. This is, in the words of the *Nicomachean Ethics*, an error that results from the lacking qualification (cf. 1137b 22).

In such a case, the defendant can suggest that further qualification has to be added by the judges, saying ‘what the legislator would have included.’ For example, further details concerning the characteristics of the object made of iron can be described, in order to make the difference between a ring and a weapon appear in the judgement. Or the intention of the person ‘raising his hand or striking’ can be taken into consideration, in order to distinguish between the deliberate use of a weapon and wearing a ring on one’s hand—‘looking not to the action but to the deliberate purpose’, as Aristotle puts it later (1374b 13–14). These qualifications would then concern the concept of ‘wounding’ as defined by the law. The defendant would argue that he ‘raised his hand’ or ‘stroke’ but did not ‘wound’, denying not the fact itself but its legal qualification.

This way of reasoning would then be strikingly similar to what is described in Chapter 13 in the paragraphs immediately preceding the discussion of fairness. Arguments from fairness as well as those concerning the *epigramma* focus on the moment of decision, which is essentially about the correspondence between the description of what happened on the one hand, and the abstract case contained by the legal rule on the other.³³⁷ In other words, the question in both cases is if a certain rule is relevant for a certain human action. Looking for the difference

³³⁷ Cf. the distinction between *Sachverhalt* and (*gesetzlicher*) *Tatbestand* in German legal doctrine, see e.g. Larenz (1969) 230–233.

between the two kinds of argument, we find Aristotle referring to *epigramma* as ‘what the laws regulate’ (περὶ ὧν [...] οἱ νόμοι ἀγορεύουσιν, 1374a 19–20) and to *epieikeia* as related to unwritten law (20–26).³³⁸ Thus, in the case of the former the speaker concentrates on how the individual action can be best described with the legal terms given. In the case of the latter, in turn, the focus is on how the legal provision should be (re)formulated to express the legislator’s (presumable) intention. In light of that, Aristotle’s advice about having definitions at hand (1374a 6–9) may equally refer to those arguing from fairness.

Having accepted an argument from fairness, the judges have to ‘supplement’ the text of the law interpreted, thereby making it irrelevant for judging the action under dispute. The intention of the legislator is thus referred to in order to make it clear that it would be contrary to this intention to punish the defendant for having committed the crime he is charged with.³³⁹ In this sense, we may agree with Jacques Brunschwig, who argues that the phrase used by Aristotle in the *Nicomachean Ethics* (‘what the lawgiver would himself have said had he been present, and would have included within the law, had he known’) refers to two different things. Supplementing the text by adding further qualification of the action in terms of facts or intention is done by reconstructing the abstract and general will of the legislator, while deciding that the rule thus obtained is not relevant for the facts of the case is ‘what the lawgiver would himself have said had he been present’. Yet these are two consecutive steps of the same line of reasoning: the consequentialist part of the argument, which leads to the decision not to apply the law needs the backing of the interpretive or rule-based part, in order to make the judges feel safe in deciding the case, apparently ‘according to the laws and

³³⁸ See n. 297 above.

³³⁹ Cf. Harris (2013b) 31.

decrees of the Athenian people'. On the other hand, Aristotle's final clause 'had he known' highlights the interdependence of the two steps. It is on the basis of the knowledge of the particular circumstances of the case and pondering the consequences of their judgement that the judges can decide where the text says less than what is necessary for a just decision. Taking into account the particular situation and offering a corresponding interpretation of the general rule of decision, the topic of definition can serve the aims of fairness, so that the speaker will be able, once again, 'to make clear what is just.'

As mentioned above, Aristotelian *epieikeia* has always been a widely discussed topic in jurisprudence and legal philosophy. The closing part of this section looks at two concepts that are sometimes used to explain *epieikeia* in jurisprudential terms: 'open texture' and 'legal gaps'.

5.3.1 Open texture

For those at least superficially acquainted with 20th-century legal theory, Aristotle's example of the iron ring shows striking similarity with the concept of 'open texture' brought into jurisprudential discourse by H. L. A. Hart in his celebrated book *The Concept of Law*.³⁴⁰ By open texture Hart refers to the inevitable indeterminacy of legal language, which explains why legal rules need to be interpreted. When deciding what a given legal rule requires one to do in a given situation, Hart writes, one has to determine the meaning of certain concept-words used in the relevant laws. In some cases this is not a problem, as there is a general consensus about what is covered by the relevant terms. In Hart's example, if a sign

³⁴⁰ The term itself stems from Friedrich Waismann (1951), who used it to describe a kind of uncertainty related to the verifiability of statements, see Hart (1961) 249, note to p. 123, with further references.

bans ‘vehicles’ from a public park, most people would agree that a car is a vehicle and, therefore, cars are not allowed to enter the park. Cars, then, belong to what Hart calls the ‘core’ of the concept of ‘vehicle’. There are, however, cases where the decision is far from being so evident: ‘What about airplanes...’ These latter cases belong to the ‘penumbra’ of the concept: focusing on the judicial decision, one may wonder whether these, too, are meant by ‘vehicle’ in the context of the park sign. An answer to that question may well involve extra-legal considerations, but the decision based on that interpretation will be a legal one.

The link between open texture and *epieikeia*³⁴¹ has been pointed out by Edward Harris in his recent article, where he states that ‘[t]he need for *epieikeia* arises as a result of “law’s open texture”’.³⁴² Moreover, open texture not only necessitates fairness but, from the perspective of legal argumentation, also enables the speaker to put forth arguments from fairness without urging the judges to decide against their oath which requires them to decide cases ‘according to the laws and decrees of the Athenian people’.³⁴³ Harris also discusses the connection between Aristotle’s topic of definition related to the *epigramma* and open texture,³⁴⁴ and it is precisely here, I think, that the link with *epieikeia* can be discovered.

Arguments from fairness, as we have seen, are not directed against written law. The speaker goes beyond written law by way of interpreting it. There are cases where there is no place for *epieikeia* arguments, as the law is unambiguous, that is to say, the speaker cannot plausibly offer an alternative interpretation of one or

³⁴¹ In earlier scholarship on the topic, Hart’s distinction between ‘easy’ and ‘hard cases’ is mentioned (but then dismissed as misleading) by Shiner (1987).

³⁴² Harris (2013b) 33.

³⁴³ Cf. Harris (2013b) 45–46.

³⁴⁴ Harris (2013a) 178.

more of its terms.³⁴⁵ For Aristotle, these are the cases where the legislator would not add anything to the written text. From a moral perspective this also means that these are the cases where justice does not have to go beyond the written law.³⁴⁶

Epieikeia, then, can (and indeed has to) work in cases where there is place left for competing interpretations of the law. What the orator has to do is to supplement the legal definition, or even to offer one of his own, in order to eliminate the ambiguity of the text. This is not to say that he has to explicitly state that something is missing from it.³⁴⁷ A more persuasive argument can be made through offering an interpretation as the single right reading of the text (and this is what usually happens in Attic oratory). While Hart distinguishes between two sources of open texture, ‘a relative ignorance of fact’ and ‘a relative indeterminacy of aim’,³⁴⁸ and Aristotle seems to do the same at least in the *Nicomachean Ethics*,³⁴⁹ the reference made in a speech to the legislator’s intent does not allow the indeterminacy of aim to appear in the argument.

5.3.2 Gaps in law

The other concept used to explain the functioning of *epieikeia* is that of ‘legal gaps’.³⁵⁰ Unlike open texture, which is only used in jurisprudence since Hart and mostly in the sense attributed to it by Hart, the concept of legal gaps has got a considerably longer tradition and, consequently, it appears in a variety of contexts and in several different senses. This ambiguity is present in the discourse about

³⁴⁵ These are what Hart (1961) calls ‘plain cases’.

³⁴⁶ *Epieikeia*, we remember, is for the cases of an *omission* from the text of the law and not meant to correct law that is wrong.

³⁴⁷ Cf. Harris (2013b) 45.

³⁴⁸ Hart (1961) 125, cf. Harris (2013b) 33.

³⁴⁹ See 1137b 22–24.

³⁵⁰ Stroux (1949) 19 already mentions ‘Lück[e] im Gesetz’.

epieikeia as well. It has been argued that *epieikeia* works in the gaps left by the legislator. As Constantine Georgiadis put it,

[t]he equitable is not a competitor to the legally just but is adjoined to it for cases which are not envisaged or adequately covered by the law. [...] The question arises regarding the task of filling out the gap in the law in an exceptional case. The decision on the particular matter has to be made, presumably by a judge. But how the gap is to be filled is not left to the free discretion of the judge. Aristotle introduces for this purpose the hypothetical judgment of the legislator.³⁵¹

Challenging Georgiadis' interpretation, Jacques Brunschwig argued that '[s]trictly speaking, the law does not manifest "gaps", but "deficiencies" in the etymological sense of the word, *i.e.* it falls short.'³⁵² It seems, however, that their disagreement is, partly at least, due to the fact that they use the word 'gaps' in different senses. Given that Georgiadis speaks about exceptional cases, he seems to be referring to what has been termed 'axiological gaps', *i.e.* cases that are 'covered by a general rule but where [...] the author of the rule has forgotten to make an exception'.³⁵³ Brunschwig, in turn, apparently has in mind 'normative gaps', *i.e.* cases not covered by the law. The distinction between the two is important not so much because of the disagreement between Georgiadis and Brunschwig but because we have to examine them separately in order to see whether each is covered by *epieikeia* or not.

'Normative gaps', to begin with, are, if they do exist at all, rather difficult to find. In fact, there are some quite convincing arguments against even the logical possibility of such gaps.³⁵⁴ If by normative gaps we only mean the lack of explicit rules relevant for a given case, then we may accept that there are such situations.³⁵⁵

³⁵¹ Georgiadis (1987) 162–163.

³⁵² Brunschwig (1996) 139, following the interpretation of *elleimma* put forth by Shiner (1987). Brunschwig's view is also accepted by Harris (2013b) 28.

³⁵³ Soeteman (2009), following the terminology of Alchourrón and Bulygin (1971).

³⁵⁴ See *e.g.* Raz (1979) ch. 4, Dworkin (1985) ch. 5.

³⁵⁵ Cf. Soeteman (2009).

The related question of whether arguments from *epieikeia* include those addressing ‘normative gaps’, i.e. arguments for the application of a law for cases not covered by it, requires a more detailed answer, which I shall try to give below in section 5.5. It seems clear, at any rate, that if *epieikeia* works through interpreting the law, then the speaker cannot argue that there is no law for the case.

‘Axiological gaps’, in turn, seem to be just what Aristotle has in mind when talking about an *elleimma* of the law. Intentionally or not, the legislator necessarily speaks in general terms, which sometimes leads to situations where the law fails to contain the provisions that would allow for a just decision.³⁵⁶ In terms of justice, then, the law ‘falls short’, but in terms of its text it has got gaps, which can be filled.

5.4 Topics of Fairness

Interpreters rightly note that Aristotle’s discussions of *epieikeia* comprise two different perspectives: one that focuses on the corrective function of *epieikeia* and one looking at *epieikeia* as a virtue.³⁵⁷ This distinction is very important because it is only by keeping these perspectives separate that one can account for the difference between the theoretical reconstruction of *epieikeia* at 1374a 26–1374b 1 and the list of related topics at 1374b 2–22. While it is not very difficult to see how *epieikeia* as a way of statutory interpretation can help the speaker to persuade the judges on the one hand, and to contribute to a just decision on the other, the topics of fairness, or at least some of them, seem much more puzzling.

The sentence that introduces the list of topics (1374b 2–3) by establishing a link with the preceding discussion of τὸ ἐπιεικὲς makes clear, at any rate, that the following list shows characteristic examples of fair and unfair actions (ποῖά ἐστι τὰ

³⁵⁶ Cf. *EN* 1137b 14–25.

³⁵⁷ See e.g. Rapp (2002) vol. 2, 503 *ad* 1374b 2–4.

ἐπιεικῇ καὶ οὐκ ἐπιεικῇ) on the one hand and persons (ποῖοι οὐκ ἐπιεικεῖς ἄνθρωποι) on the other.

5.4.1 *Syngnōmē*

The actual list of examples begins with having *syngnōmē*.³⁵⁸ *Syngnōmē* appears in Book 6 of the *Nicomachean Ethics* as a capacity related to deciding about what is *epieikes*.³⁵⁹ While it is sometimes interpreted as some kind of an extra-legal consideration based on empathy alone,³⁶⁰ in the *EN* Aristotle makes it clear that it is directed at truth, which is also emphasised at the end of the example in the *Rhetoric*, where *to alēthes* is opposed to the *gegrammenos nomos*.³⁶¹ The framing³⁶² of the following distinctions between *hamartēmata* and *adikēmata*, and *hamartēmata* and *atychēmata*, respectively, suggests that making such distinctions (μὴ τοῦ ἴσου ἄξιον, 1374b 5) belongs to the domain of *syngnōmē*.

Aristotle gives exact criteria for each of the three cases (1374b 6–10).

Atychēmata, he says, cannot be anticipated by reason (παράλογα) and are not

³⁵⁸ The opening phrase of the list, ἐφ' οἷς τε γὰρ δεῖ συγγνώμην ἔχειν, ἐπιεικῇ ταῦτα, raises problems in terms of rendering as well. Kennedy (2007) 100 takes ταῦτα to refer to ἐφ' οἷς, and οἷς to be the indirect subject of συγγνώμην ἔχειν, which results in the translation 'those actions that [another person] should pardon are fair'. The reason why one should pardon whatever is *epieikes* is not quite clear, however. The subsequent phrases (about distinguishing between *hamartēmata*, *atychēmata*, and *adikēmata*) suggest that it is the συγγνώμην ἔχειν that is to be considered as *epieikes*, and its indirect subject ἐφ' οἷς [...] δεῖ: 'it is fair to pardon what should be [pardoned]'. Ταῦτα, instead of τοῦτο, may be explained either by the multiplicity of the situations where *syngnōmē* is needed, or by the instances of *epieikeia* that follow. Grimaldi (1980) 302 *ad loc.* (1) and (3) rightly sees συγγνώμην ἔχειν as an instance of ἐπιεικῇ, but fails to give a satisfactory explanation for his interpretation.

³⁵⁹ *EN* 1143a 19–24: Ἡ δὲ καλουμένη γνώμη, καθ' ἣν συγγνώμονας καὶ ἔχειν φαμέν γνώμην, ἢ τοῦ ἐπιεικοῦς ἐστὶ κρίσις ὀρθή. σημεῖον δέ· τὸν γὰρ ἐπιεικῇ μάλιστα φαμεν εἶναι συγγνωμονικόν, καὶ ἐπιεικὲς τὸ ἔχειν περὶ ἓνα συγγνώμην. ἢ δὲ συγγνώμη γνώμη ἐστὶ κριτικὴ τοῦ ἐπιεικοῦς ὀρθή· ὀρθή δ' ἢ τοῦ ἀληθοῦς.

³⁶⁰ See, however, Grimaldi (1980) 302 *ad* 1374b 4 (2).

³⁶¹ 1374a 36–b 1: κατὰ μὲν τὸν γεγραμμένον νόμον ἔνοχός ἐστι καὶ ἀδικεῖ, κατὰ δὲ τὸ ἀληθές οὐκ ἀδικεῖ, καὶ τὸ ἐπιεικὲς τοῦτό ἐστιν.

³⁶² The section on *syngnōmē* seems to be finished by καὶ τὸ τοῖς ἀνθρωπίνους συγγινώσκειν ἐπιεικές (1374b 10–11).

caused by an evil moral disposition (μὴ ἀπὸ μοχθηρίας). *Hamartēmata*, in turn, can be anticipated (μὴ παράλογα) but do not stem from moral badness either (μὴ ἀπὸ πονηρίας). It is only the *adikēmata* that can be anticipated by reason and result from an evil moral disposition, from which wrongs committed because of desire (δι' ἐπιθυμίας) are no exception.

Apparently, then, it is only the *adikēmata* that deserve the full rigour of the law, while *hamartēmata* and *atychēmata* call for a more lenient treatment. While Aristotle gives no examples here, his criteria make it quite clear what cases belong to each of these categories. *Adikēma*, which has been defined at the beginning of Chapter 10 (1368b 6–7 and 9–10), is the case the legislator has in mind when drafting a law about a certain crime. Compared to that, an adequate adjudication of *hamartēmata* and *atychēmata* may require some additions to the legal definition of the crime, just as described under the heading of *epieikeia*.

In the case of an *atychēma*, the 'wrongful intention' on the part of the person committing the crime is missing altogether. The paradigmatic case of that is the harm caused by a natural disaster, as e.g. in the case of a storm that prevents a ship from reaching a port.³⁶³

Hamartēmata are, likewise, done without intention, i.e. not ὅσα εἰδότες (cf. 1368b 9–11). These cases show a striking similarity with the class of human actions covered by 'negligence' in modern Western legal terminology.³⁶⁴ In modern criminal law, usually three or four degrees of culpability are distinguished: intention (which may fall into two parts, a 'direct' and an 'eventual' one),³⁶⁵

³⁶³ For examples of *trierarchs* being acquitted, most probably due to their excuses of *force majeure*, see Harris (2013b) 44–45.

³⁶⁴ See e.g. Hamburger (1971) 102, Harris (2013b) 32.

³⁶⁵ In continental Europe and most US states, the fourfold division, which goes back to 19th-century German jurisprudence and distinguishes between direct (*dolus directus*) and eventual intention (*dolus eventualis*), appears in penal codes. German criminal jurisprudence today makes a further

recklessness, and negligence. The difference between these consists in the perpetrator's attitude to the result of his action. In the case of intention, he either acts in order to bring about the result, i.e. he both foresees and desires it (direct intention), or foresees the result and does not refrain from the action (eventual intention). In the case of recklessness, he is aware of the potential result of his action, which he does not desire but does not prevent either. Finally, negligence consists in being unaware of the potential results of one's action because of one's failure to foresee what could be reasonably expected. Similarly to criminal negligence, the concept of negligence in tort law is based on the failure to 'conform to the standard of care set by law', resulting in some damage suffered by another person.³⁶⁶ Thus, we can see that the core element in modern negligence is an omission on the part of the perpetrator, which results in harm unintentionally done to other people.

While Aristotle does not speak of omission, *μη παράλογα* may in fact refer to an objective standard of reasonable expectations rather than (or at least as well as) to one's subjective foresight.³⁶⁷ Moreover, it is clear that there were cases of *hamartēmata* identified as such in Athenian legal practice,³⁶⁸ that would in modern law fall under 'negligence'.

Aristotle's distinction of actions in the *Nicomachean Ethics* supports the identification of *hamartēma* with negligence, and is also illuminating for the use of

distinction between two grades of direct intention, called (1) *Absicht* and (2) *direkter Vorsatz*, see e.g. Wessels and Beulke (2002) 73–74. In English law, statutes and jurisprudence tend to use the above three categories of *mens rea*, albeit without the strict definitions, see e.g. Herring (2007) 84–96.

³⁶⁶ See Deakin, Johnston, and Markesinis (2008) 113–114.

³⁶⁷ This is reflected e.g. in Christopher Rowe's translation of the *EN*, see Broadie and Rowe (2002) 170. Cf. Rapp (2002) vol. 2, 504 *ad* 1374b 4–1374b 10, who argues that the otherwise rather vague feature of *μη παράλογα* only serves to justify placing *hamartēmata* between the two other categories. Grimaldi (1980) 303 *ad* 1374b 7, interestingly and somewhat inconsistently (cf. *ibid.* *ad* 1374b 6 (2)), takes *μη παράλογα* in the case of *hamartēmata* to mean 'something understandable [...], acceptable'.

³⁶⁸ Cf. Harris (2013b) 32.

syngnōmē in legal argumentation. There, the first division regards whether the action was done voluntarily (ἐκούσιον) or involuntarily (ἀκούσιον): the latter are the result of force or ignorance for which the agent is not responsible (1135a 24–27). The second dichotomy is within voluntary actions, with previous choice based on deliberation as the distinctive factor (1135b 8–11). Aristotle then states that τὰ μὲν μετ’ ἀγνοίας ἁμαρτήματα ἐστίν (12), and introduces the distinction between *atychēma* (ὅταν μὲν οὖν παραλόγως ἢ βλάβῃ γένηται) and *hamartēma* (ὅταν δὲ μὴ παραλόγως, ἄνευ δὲ κακίας), adding that in the case of the latter the cause of the wrong is within the perpetrator (ὅταν ἡ ἀρχὴ ἐν αὐτῷ ἢ τῆς αἰτίας), while in the former it is external (ὅταν ἔξωθεν) (16–19). The next distinction is made within the category of *adikēma*, i.e. harmful actions done knowingly (εἰδώς): those without *probouleusis*, albeit unjust actions, are no sign of an evil personality, while those done after deliberation are done by unjust and vile characters (ἄδικος καὶ μοχθηρός) (19–25).

This latter distinction seems to indicate a difference between the perspectives of the *Rhetoric* and the *Nicomachean Ethics*. In the former, Aristotle simply classifies wrongs committed because of a passion as *adikēmata* (cf. 1373b 35–36). In the latter, he emphasises that while those actions are indeed *adikēmata*, and the persons committing them do wrong (ἀδικοῦσι), they are not *adikoi*. The careful qualification of the passions that are ὅσα ἀναγκᾶ ἢ φυσικὰ (21) links that passage to what comes a few lines later, where a similar qualification is made within the scope of *hamartēmata*. There, Aristotle denies *syngnōmē* in cases where the perpetrator ‘acts not because of ignorance but in ignorance, because of a state of feeling that is neither natural, nor human’ (1136a 7–9). Together with the expression ἁμαρτάνοντες ἀδικοῦσι (1135b 22–23), this may serve to underline that wrongs done because of passion are somewhere between the paradigmatic cases of

adikēmata and *hamartēmata*, at least in terms of culpability. With that in mind, the closing sentence of the *syngnōmē* section in the *Rhetoric*, καὶ τὸ τοῖς ἀνθρωπίνους συγγινώσκειν ἐπιεικές (1374b 10–11), may be taken to broaden the scope of *syngnōmē* beyond *atychēmata* and *hamartēmata*, to include cases where a wrong has been done knowingly but without *probouleusis*, because of a passion that belongs to *ta anthrōpina*.

5.4.2 Letter and Intent

The next topics of *epieikeia* oppose the letter of the law and the intent of the legislator (1374b 11–13: καὶ τὸ μὴ πρὸς τὸν νόμον ἀλλὰ πρὸς τὸν νομοθέτην, καὶ μὴ πρὸς τὸν λόγον ἀλλὰ πρὸς τὴν διάνοιαν τοῦ νομοθέτου σκοπεῖν). As opposed to *syngnōmē*, where the focus was on the perpetrator's attitude, these topics focus on the desirable way of statutory interpretation.³⁶⁹ Looking at the legislator's intent is, as we have seen, essential for building up an argument from fairness, at least if one wants to avoid making the impression of urging a decision *contra legem*.

5.4.3 Intention

After the opposition of letter and intent, further topics concerning the perpetrator follow. The first of these regards *prohairesis* as opposed to the action itself (1374b 13–14: καὶ μὴ πρὸς τὴν πράξιν ἀλλὰ πρὸς τὴν προαίρεσιν), thus continuing the considerations related to *syngnōmē*. On the other hand, this topic seems to respond to that of definition, where Aristotle says that the question of whether an action qualifies as a certain crime should be decided on the basis of *prohairesis* (1374a 11–13). A further link is to Chapters 10–12, where the probabilities are related to

³⁶⁹ Harris (2013b) 32.

intention rather than an action being actually committed.

5.4.4 Part and Whole

The next two topics oppose the part and the whole, first in the abstract (μη πρὸς τὸ μέρος ἀλλὰ πρὸς τὸ ὅλον), then in terms of the perpetrator's behaviour (μηδὲ ποῖός τις νῦν, ἀλλὰ ποῖός τις ἦν ἀεὶ ἢ ὥς ἐπὶ τὸ πολὺ). The former is, in itself, sufficiently general to be regarded as another formulation of the essence of *epieikeia*, i.e. the requirement of achieving a decision that is adequate to the individual case. The second one, however, may seem more problematic, as it seems to call for a decision based on past events rather than on the action under dispute.³⁷⁰ While this possibility cannot be excluded, there are other possible explanations which come closer to what seems to be the basic principle of *epieikeia*. First, past events may be considered, if not for deciding about the lawfulness of an action, then for imposing a penalty.³⁷¹ Such a reading would also highlight a possible Platonic influence.³⁷² Second, the general behaviour of the defendant may be used as indirect proof for his moral character and, consequently, his *prohairesis* in the specific case.³⁷³ Third, it is also possible that these topics are not only meant to be used in connection with the judges' decision but also for displaying fairness

³⁷⁰ References to past deeds do occur in oratory. An example may be mentioning public service, which is rejected as irrelevant e.g. by Lys. 12.38: οὐ γὰρ δὴ οὐδὲ τοῦτο αὐτῷ προσήκει ποιῆσαι, ὅπερ ἐν τῇδε τῇ πόλει εἰθισμένον ἐστί, πρὸς μὲν τὰ κατηγορούμενα μηδὲν ἀπολογεῖσθαι, περὶ δὲ σφῶν αὐτῶν ἕτερα λέγοντες ἐνίοτε ἐξαπατῶσιν, ὑμῖν ἀποδεικνύοντες ὡς στρατιῶται ἀγαθοί εἰσιν, ἢ ὡς πολλὰς τῶν πολέμιων ναῦς ἔλαβον τριηραρχήσαντες, <ἢ> πόλεις πολέμιας οὐσας φίλας ἐποίησαν. Cf. Harris (2013a) 127–128, pointing out also that courts may not have paid attention to such arguments (with examples from Aeschin. 3.195, Din. 1.14, D. 21.143–147, 19.273 and 277, 24.133–134).

³⁷¹ See e.g. Dinarchus, *Against Philocles* 11. Cf. Saunders (1991) 113–118, Lanni (2006) 62. Harris (2013a) 131–136 points out that in the *timēsis* the scope of relevant information was broader than in the first part of the trial, where the judges had to decide the question of guilt.

³⁷² Cf. e.g. Lg. 862c 6–e 2, where the Athenian speaker explains that punishments should differ according to whether the perpetrator can be 'healed' or not.

³⁷³ Cf. Saunders (1991) 113, Johnstone (1999) 95–97, Lanni (2006) 60–61.

within a speech.

5.4.5 Memories

There are two further topics that concentrate explicitly on past deeds (1374b 16–18). The first one opposes good things to bad things experienced by the same person (τὸ μνημονεύειν μᾶλλον ὧν ἔπαθεν ἀγαθῶν ἢ κακῶν), and the second one good things done by someone to good things done to the same person (ἀγαθῶν ὧν ἔπαθε μᾶλλον ἢ <ὧν> ἐποίησεν). Here again, it is hard to see how these could contribute to persuasion concerning the lawfulness of a specific action. Moreover, unlike in the previous topics, the opposition is not between one's general character and an individual action but between (perhaps several) particular actions, and the emphasis is not on the actions themselves but on the act of μνημονεύειν. Therefore, the second option of interpretation mentioned above in connection with the topics of 'part and whole' is out of question. It seems more likely that it is not the judges who 'remember' something but someone of the other participants of the legal procedure, and that μνημονεύειν is used here in the sense of 'mentioning' something.

5.4.6 Attitudes to Wrongdoing and Litigation

In the case of the last three topics (1374b 18–22) there is no doubt that they do not regard the judges' attitudes but those of the litigants (or someone who is not directly involved in the case but is characterised in the speech). They say that fairness requires patience (τὸ ἀνέχεσθαι ἀδικοῦμενον), and that it is fair to prefer settling a dispute through words to doing so through deeds (τὸ μᾶλλον λόγῳ ἐθέλειν κρίνεσθαι ἢ ἔργῳ). The former may be regarded as an echo of *EN* 1138a 1–2

(ὁ μὴ ἀκριβοδίκαιος ἐπὶ τὸ χεῖρον ἀλλ' ἐλαττωτικός, καίπερ ἔχων τὸν νόμον βοηθόν), although the three topics in the *Rhetoric* follow an order from the most general to the most specific, and being patient does not in itself contain any reference to litigation.

The opposition of words and deeds is widespread in Greek literature and the variety of contexts in which it appears does not allow for attributing one single meaning to it. What seems the most likely here is that, as mentioned above, the three topics start with a general attitude (patience) and finish with the choice between arbitration and judicial decision-making. Hence, one may reconstruct the three steps as three choices between (1) being patient and trying to retaliate; (2) trying to settle the dispute through arguments (which includes the possibility of a legal debate) and physical retaliation; (3) settling the dispute through arbitration and taking the issue to court (τὸ εἰς δίκην μᾶλλον ἢ εἰς δίκην βούλεσθαι ἰέναι).

The third topic is accompanied by a brief explanation concerning the nature of arbitration, according to which its *raison d'être* is that unlike judges, arbitrators base their decisions upon fairness rather than the laws (ὁ γὰρ διαιτητὴς τὸ ἐπιεικὲς ὁρᾷ, ὁ δὲ δικαστὴς τὸν νόμον). While this opposition may seem to suggest that courts are not allowed to take *to epieikes* into consideration, which would contradict both what Aristotle says in the *Rhetoric* and the *Nicomachean Ethics*,³⁷⁴ and contemporary judicial practice,³⁷⁵ it is in fact the arbitrators who are in the focus here and Aristotle seems to mean only that they do not have to provide an explanation that is supported (exclusively) by an interpretation of the written

³⁷⁴ See *EN* 1132a 4–32, where Aristotle describes the judge as *dichastēs*, i.e. who establishes the just mean, cf. Mirhady (2006) 2. See also Harris (2013b) 32, note 20.

³⁷⁵ See Roebuck (2001) 182, Harris (2013b) 34, *pace* Meyer-Laurin (1961) 41.

law.³⁷⁶

The last three topics clearly do not say anything about how the judges should decide. Neither the first nor the second one can be used as an argument concerning the merits of the legal case. The remark attached to the third one, where arbitration and adjudication by the court are compared, may appear in an arbitration case as a means of reminding the arbitrators of their duty to make a fair decision, but the assertion that ‘it is fair to prefer arbitration to adjudication’ cannot really contribute to such a decision. Therefore, their place in Aristotle’s list is best explained if one does not read them as topics for arguments in the strict sense. Together with some of the other items of the list, they seem to serve as topics of characterisation focusing on the *ethos* aspect of the speech rather than the *logos*.³⁷⁷ What connects them to the other, ‘legal’ topics and the preceding discussion of what is *to epieikes* in law is that they likewise stem from Aristotle’s definition of fairness and represent popular beliefs of morality. One should not, however, look in them for principles of legal interpretation, nor can they be used to reconstruct Aristotle’s views on the functioning of *epieikeia* in judicial decision-

³⁷⁶ On the general character of arbitration see Meyer-Laurin (1961) 41–45 and the survey of Roebuck (2001). On the difference between the *dikastēs* and the *diaitētēs*, both Meyer-Laurin (1961) 37, note 130 and Mirhady (2006) 2–3 quote Aristotle’s criticism of Hippodamus’ ideas concerning the ideal constitution (*Pol.* 1268b 4–13): οὐ καλῶς δ’ οὐδ’ ὁ περὶ τῆς κρίσεως ἔχει νόμος, τὸ κρίνειν ἀξιοῦν διαιροῦντα, τῆς δίκης ἀπλῶς γεγραμμένης, καὶ γίνεσθαι τὸν δικαστὴν διαιτητὴν. τοῦτο δὲ ἐν μὲν τῇ διαίτῃ καὶ πλείοσιν ἐνδέχεται (κοινολογοῦνται γὰρ ἀλλήλοις περὶ τῆς κρίσεως), ἐν δὲ τοῖς δικαστηρίοις οὐκ ἔστιν, ἀλλὰ καὶ τούναντίον τούτου τῶν νομοθετῶν οἱ πολλοὶ παρασκευάζουσιν ὅπως οἱ δικασταὶ μὴ κοινολογῶνται πρὸς ἀλλήλους. ἔπειτα πῶς οὐκ ἔσται ταραχώδης ἡ κρίσις, ὅταν ὀφείλῃ μὲν ὁ δικαστὴς οἶηται, μὴ τοσοῦτον δ’ ὅσον ὁ δικαζόμενος;

³⁷⁷ Cf. Harris (2013b) 32. A striking parallel for this usage of *epieikeia* can be found in the treatise *Peri ideōn* attributed to the 2nd-century (AD) rhetorician Hermogenes of Tarsus, see Herm. *Id.* 2.6 (pp. 345–352 Rabe). Hermogenes starts by stating that ἐπιεικὴς καὶ ἠθικὸς λόγος γίνεται κατ’ ἔννοιαν μὲν, ἥτοι ὅταν ἐκόντα τις αὐτὸν μειονεκτοῦντα δεικνύῃ (345.6–7). He later quotes Plato’s definition of fairness from the *Laws* (καθόλου γὰρ ἡ ἐπιείκεια παρατεθραυσμένον ἔχει τὸ δίκαιον διὰ φιланθρωπίαν, ὡς ἔφη Πλάτων, 345.12–13, cf. Plat. *Lg.* 757e 1–3), but makes no reference to Aristotle. His examples include, however, arguments from *ta anthrōpina* (345.17–18: τὸ τοῖς πολλοῖς ἑαυτὸν συναριθμεῖν, quoting D. 21.1, although Hermogenes says that this argument displays *epieikeia* because τὸ μὴ ὄντα οὖν τῶν πολλῶν ἕνα ἑαυτὸν ἐν τοῖς πολλοῖς ἀριθμεῖν οὐδὲν ἄλλ’ ἢ ἐκόντα μειονεκτεῖν ἐστίν, 345.14–16), as well as highlighting one’s unwillingness to come to court (τὸ λέγειν, ὡς παρὰ γνώμην δικάζεται καὶ ὡς ἀναγκάσαντος τοῦ ἐχθροῦ εἰς δικαστήριον ἦκει δέον ἐπὶ τῶν φίλων καὶ τῶν ἐπιτηδείων διακεκρίσθαι, 346.9–12, quoting D.27.1).

making.

5.5 *Epieikes* and Extensive Interpretation

What we have seen so far of *epieikeia* is usually interpreted as serving the aim of justifying a lenient application of law,³⁷⁸ and most interpreters agree that this is the only way in which arguments from fairness can be used, as the supplementing of legal definitions is not meant to be used for establishing legal responsibility where a certain behaviour is not explicitly forbidden by law.³⁷⁹

The possibility of a broader reading of *epieikeia* was first raised in modern scholarship by Max Hamburger, in his survey of Aristotle's legal theory.³⁸⁰ Discussing the treatment of *epieikeia* in the *Magna Moralia* (2.1–2), Hamburger claims that it is 'correct in principle but wrong in its particular formulation', as it is 'misleading [...] to suppose that such a gap in the law has no other meaning than to entitle the claimant to less than the law would give'. The reason for this narrow view of *epieikeia*, he says, may be the strong influence of the earlier understanding of the expression,³⁸¹ which then gives way to a broader interpretation in Aristotle's later works.

According to Hamburger, the *Nicomachean Ethics* adds much to the conceptual analysis of *epieikeia*, clarifying its relationship with law and justice, but he still finds it wanting, as the 'material aspect [...] has only been touched upon in

³⁷⁸ In terms of the roles within a legal dispute, this is usually meant to say that *epieikeia* favours the defendant: see e.g. Harris (2013b) 27, note 6 and 28, note 11.

³⁷⁹ This is made explicit by Triantaphyllopoulos (1985) 20–21. See also Kraut (2002) 109, note 19, who refers to Shiner (1987). Brunschwig (1994) 142 seems to endorse a similar view. Grimaldi (1980) and Rapp (2002) do not confine *epieikeia* to the lenient application of law but do not discuss the possibility of arguing for an extensive interpretation on the basis of *epieikeia* either.

³⁸⁰ Hamburger (1971) 94–95.

³⁸¹ Hamburger (1971) 94, cf. *ibid.* 90–93.

the old, traditional meaning of not to be a stickler for one's rights'.³⁸² It is only in the *Rhetoric* that it becomes entirely clear that *epieikeia* is meant to serve as a corrective of written law within the framework of the division of roles described in the introductory chapter of Book I. Aristotle wants laws to be as detailed as possible, but he is aware of the fact that even the best laws cannot cover all possibilities. Thus, *epieikeia* works in the space left for the judge to perform his task of deciding about the facts.³⁸³

The interpretation of *epieikeia* in the *Rhetoric* is sufficiently general to cover arguments in both directions: for the denial of responsibility as well as for its extension.³⁸⁴ In this sense, it corresponds to Hamburger's insight formulated in his discussion of the *MM*: 'even though only the aspect of yielding is stressed [...] [i]f we consider the other side, the other party to the contract, involved in this equitable adjudication we at once realize that this party receives—under the same title of *epieikeia*—more than what the letter of law would give.'³⁸⁵

While Hamburger may not be entirely justified in formulating his expectations as to the 'correct' formulation of Aristotle's theory, his observations concerning the differences between approaches reflected by the three works are nevertheless pertinent. In fact, scholars' apparent unwillingness to seriously consider the possibility of extensive interpretation being covered by *epieikeia* may stem from three factors. Firstly and most importantly, Aristotle presents the arguments related to both *epigramma* and *epieikeia*, as well as his examples, from the perspective of the defendant. Secondly, where *epieikeia* is mentioned in the

³⁸² Hamburger (1971) 99.

³⁸³ Cf. Hamburger (1971) 103–104. Also Grimaldi (1980) 299 *ad* 1374a 26 (1) notes the connection with 1354a 26–b 16.

³⁸⁴ See also the use of arguments from fairness in connection with the issue of *sylogismos* in later rhetorical doctrine: cf. Stroux (1949) 40, and ch. IV, sect. 1.5 below.

³⁸⁵ Hamburger (1971) 95.

orators, it refers to a lenient application of law.³⁸⁶ Thirdly, some scholars might be influenced by the idea of *nullum crimen, nulla poena sine lege*, which is part of Western legal thought.

Of these sources of reluctance, the last one is the least problematic, as *epieikeia* arguments work through the interpretation of existing laws rather than the invention of new ones (that is to say, the speaker would not acknowledge that there is no law prohibiting the act under consideration). As for the perspective of Aristotle's discussion, it should not be taken as a conclusive evidence, since there are arguments where the perspective is that of the plaintiff. In chapters 10–12, he focuses on the questions of what kind of people harm what kind of people and for what reasons, adding however that the orator should examine these points according to whether he is accusing or defending. In chapter 14, the topics of magnitude are presented from the perspective of the plaintiff, while in chapter 15 arguments related to non-technical proof are listed for both parties, with the distinction made according to whether the proof supports the speaker's cause or not. The evidence of the orators is rather meagre if one only considers the passages where the terms *epieikeia* or *to epieikes* occur, and in most of these they are used 'as a general term of commendation for moderate and decent persons'.³⁸⁷ Even in those cases, where *epieikeia* apparently refers to a legal phenomenon, it is used to describe an attitude in general rather than to support a specific claim or argument.³⁸⁸ This, in turn, raises the question of what one should look for when trying to find arguments from fairness in forensic speeches: a question to which I

³⁸⁶ As in Gorgias' funeral oration (DK 82 B 6), or D. 21.90: εἰ μὲν ἡδίκηκε, δίκην δῶ, εἰ δὲ μή, ἀποφύγη, ἄτιμον Ἀθηναίων ἐν' εἶναι δεῖ καὶ μήτε συγγνώμης μήτε λόγου μήτε ἐπιεικείας μηδεμιᾶς τυχεῖν, ἃ καὶ τοῖς ὄντως ἀδικοῦσιν ἅπανθ' ὑπάρχει. Cf. Harris (2013b) 34, see also Saunders (2001) 71, 75–80. See also Th. 3.40.2, where Cleon argues that the Athenians should not be led astray τρισὶ τοῖς ἄξυμφορωτάτοις τῇ ἀρχῇ, οἴκτω καὶ ἡδονῇ λόγων καὶ ἐπιεικείᾳ.

³⁸⁷ Saunders (2001) 75.

³⁸⁸ See n. 386 above.

shall now turn.

5.6 Fairness in Practice

The question of whether arguments from fairness were present in Attic judicial oratory is important for us for at least three reasons. First, as in the cases of probability and definition, answering it may contribute to our understanding of what Aristotle is doing in the *Rhetoric*: reflecting on contemporary practice or rather formulating principles of argumentation based entirely on introspection. Second, if a link between Aristotle and practical oratory can be established, the question concerning the character of that link emerges: does Aristotle codify, as it were, the practice observed in the courts, or does he offer a way to develop it? Third, arguments from fairness deployed in ‘genuine’ speeches may have an impact on our interpretation of the text of the *Rhetoric*, and in particular on our answer to the question raised in the previous section, i.e. whether Aristotelian *epieikeia* leaves space for an extensive interpretation of written law in addition to the lenient application of law based on its restrictive interpretation.

According to the widespread view that may be now regarded as the traditional one, Athenian law (or ancient Greek law in general) relied on the use of fairness to a great extent.³⁸⁹ In these accounts, fairness is identified with the use of extra-legal arguments,³⁹⁰ and it is sometimes argued that such arguments actually prevailed over strictly legal ones.³⁹¹ This view has several different sources, and, interestingly, does not seem to be based primarily on a thorough analysis of the

³⁸⁹ Its most influential exponents in earlier scholarship have been Vinogradoff (1912/13), (1922) 63–71, and Jones (1956) 64–65, cf. Harris (2013b) 26, note 2.

³⁹⁰ See e.g. Todd (1993) 54–55, Moreno (2007) 218, cf. Harris (2013b) 28, note 11. See also Lanni (2006) ch. 3, discussing fairness under the heading ‘Extra-Legal Argumentation’.

³⁹¹ See e.g. Lanni (2006) 2–3.

arguments deployed in the extant judicial speeches. Rather, it attributes a considerable weight to contemporary opinions about the way popular courts made their decisions, which can be found e.g. in the orators³⁹² but also in Aristotle.³⁹³ A second source may be Aristotle's discussion of *epieikeia* arguments, taken together with his list of what may be regarded as *epieikes*, but also with the topics against written law.³⁹⁴ Thirdly, this view also seems to result from a comparison between Greek and Roman law³⁹⁵ on the one hand, and between the ancient Greek and modern Western legal cultures³⁹⁶ on the other, with the differences being emphasised in both cases. Thus, the different approaches of individual authors notwithstanding, proponents of this view all agree that fairness played a considerable, perhaps definitive, role in Athenian legal practice, and also that its importance was somehow due to the character of the Athenians' approach to law, which reflected in their institutions as well as the functioning of these.³⁹⁷

The first challenge against the traditional view was formulated in modern scholarship by Harald Meyer-Laurin,³⁹⁸ who argued that an analysis of the evidence does not confirm that fairness would have served as a basis for judicial decisions. As for Aristotle's discussion of *epieikeia* in the *Rhetoric*, Meyer-Laurin claimed that it is based on a moral rather than a legal conception of fairness,³⁹⁹ and

³⁹² See e.g. Lys. 30.27.

³⁹³ See *Rhet.* 1354b 6–11, 33–1355a 1. See also the passages of the *Ath. Pol.* collected in Ruschenbusch (1957) 257–258.

³⁹⁴ Cf. e.g. Vinogradoff (1912/13) 84, Hurri (2013) 156.

³⁹⁵ Cf. e.g. Vinogradoff (1912/13) 81, Wolff (1975) 397–398.

³⁹⁶ A recent example is Lanni (2006) 115–116.

³⁹⁷ The classic statement of the view that in classical Athens the judiciary practically performed legislation is Ruschenbusch (1957).

³⁹⁸ Meyer-Laurin (1965).

³⁹⁹ Meyer-Laurin (1965) 50–52.

that it has no connection with contemporary legal practice.⁴⁰⁰

A different interpretation of the evidence, and of Aristotle's passages, has been offered by Edward Harris in his recent work.⁴⁰¹ Affirming the presence of *epieikeia* in the legal argumentation of the Attic orators, and denying at the same time the extra-legal character of such arguments, Harris regards fairness as a principle that informed legal interpretation by the courts, without requiring the judges to decide *contra legem* and against their judicial oath.⁴⁰² Seen in this light, Aristotle appears as an author whose theory is based on, and not formulated against, contemporary practice.⁴⁰³

To be able to assess the role played by fairness in legal argumentation, one should first define the nature of the evidence one is looking for. These methodological considerations are important because they apparently influence the research outcomes. Meyer-Laurin's starting question is whether 'es eine Berücksichtigung der Billigkeit im positiven Recht Athens gegeben hat', and he analyses judicial speeches to see whether 'die Parteisprecher auf Billigkeitsargumente berufen und die Gerichte Billigkeitsgründe beachtet haben'. In doing so, he is looking for references to what he calls 'das juristische Prinzip', excluding at the same time 'rhetorische Berufungen auf Billigkeit'. While the latter move is completely justified, the requirement of referring to the legal principle of *epieikeia* seems problematic. What Meyer-Laurin wants the speakers to argue, in order that their arguments qualify as arguments from fairness, is that moral considerations should be given precedence over the provisions of written law.

⁴⁰⁰ Meyer-Laurin (1965) 52, quoting Hans Julius Wolff's opinion that Aristotle only displays a 'merely incidental interest in matters legal': Wolff (1945) 102, see also Wolff (1975) 399.

⁴⁰¹ See Harris (2004a) and most recently Harris (2013b).

⁴⁰² Harris (2013b) 45–46.

⁴⁰³ Harris (2013b) 45. See also Triantaphyllopoulos (1985) 24.

What he finds, in turn, is that the reasoning of judicial speeches is based primarily on written law, however irrelevant these references may be, with moral considerations mentioned only in order to show that the application of the statutes is not going to lead to an unjust decision.

Unlike Meyer-Laurin, Harris grounds his survey of the evidence on an analysis of Aristotle's discussion of *epieikeia* in the *Nicomachean Ethics* and the *Rhetoric*.⁴⁰⁴ Due to the insights gained from this analysis, Harris is not looking for *epieikeia* being opposed to law in general. Rather, he seeks to identify argumentative patterns in the speeches that correspond to Aristotle's topics of fairness. What he finds, then, is arguments that seek to vindicate 'justice beyond (written) law' without questioning the validity of written law. The rationale for going beyond the strict interpretation of the legal text is, Harris argues, the principle of fairness that can be discovered in the legal system of the polis. Thus, the orators can invoke fairness as an aspect of the spirit of the laws, which is also present, even if in an imperfect form, in the statutes relevant for the respective cases. In terms of legal history, this means that Athenian law did in fact recognise *epieikeia*. In terms of arguments from fairness, this means that they are somehow linked to the concept of a legal order, which provides backing for a not-so-strict interpretation of the law.

The latter insight is of particular importance for us here, since it links back to the functioning of arguments from fairness, which I tried to investigate above on the basis of Aristotle's example. I argued that these arguments work through definition, i.e. the speaker has to offer an interpretation of the key conceptual elements of the legal provision in order to show that, as in the case of the man

⁴⁰⁴ Harris (2013b) 26–32.

striking with a ring on his finger, the law invoked by the plaintiff does not apply to the case. Harris' examples of judicial oratory show that such an interpretation is not necessarily made explicit in the speech. Aristotle, in turn, has to explain to his readers how an *epieikeia* argument can be constructed, and therefore he has to make it clear, too, that it is based on the legislator's intent, which is, again, not always mentioned in actual speeches.

Thus, Harris' research highlights the key elements of arguments from fairness appearing in judicial rhetoric, and it also confirms that they correspond to what can be identified as the key elements of Aristotle's description of *epieikeia* arguments. With these conceptual elements in mind, we may now turn to the question raised in the previous section, i.e. whether arguments from fairness work in both directions. As mentioned above, *epieikeia* is usually taken to serve the interests of the defendant, and Aristotle's example refers to such a case, but 'justice beyond written law' seems to be more generally valid.

The possibility of extensive interpretation of statutes as an instance of *epieikeia* has been examined in a recent publication by Yasunori Kasai,⁴⁰⁵ who devotes most of his efforts to refute Meyer-Laurin's claim that fairness did not play much role in Athenian law before the Ptolemaic Age.⁴⁰⁶ He does so by identifying some key terms in Aristotle's definition of wrongdoing, then pointing out the same terms in the legal argumentation of two courtroom speeches, Demosthenes' speech *Against Dionysiodorus*, and Hypereides' *Against Athenogenes*.⁴⁰⁷ While its method is

⁴⁰⁵ Kasai (2010).

⁴⁰⁶ Meyer-Laurin (1965), cf. sect. 5.5 above. Kasai also argues that a parallel can be drawn between (this interpretation of) *epieikeia* and the Japanese concept of *Jori*, a rough equivalent of 'public order' or 'good morals', which was used in criminal as well as private law. While taking a position on that latter question would require a thorough knowledge of Japanese legal history, which I cannot pretend to have, the notion of a 'negative *epieikeia*' is certainly relevant for us here.

⁴⁰⁷ He sees two links between the arguments of the speeches and Aristotle's conceptual analysis: 'both cases are suits for damages (δίκη βλάβης) and we can see a strong connection between the

not without dangers,⁴⁰⁸ Kasai's essay nevertheless has the merit of looking at the evidence without presupposing the one-sidedness of *epieikeia*.⁴⁰⁹ Yet as in the case of 'positive' *epieikeia*, one should not expect orators to argue that the defendant ought to be punished because this is what *epieikeia* requires. What one should look for is, again, a certain structure of argument: in this case, one that advocates an extensive interpretation of the law with reference to the legislator's intent, probably focusing on the definition of key legal terms.

Looking at extant pieces of Athenian forensic oratory, we see that there occur such structures. Actually, some arguments deployed by the speaker in Hyp. *Ath.* help to substantiate Kasai's main claim more than the terminological correspondences he discusses. In order to show that a certain contract is unlawful and therefore not valid, the speaker quotes several laws, which are *prima facie* irrelevant for his case. By doing so, he seeks to reconstruct the legislator's intention on the basis of these laws⁴¹⁰ in which it is expressed in complete form, i.e. where a distinction is made between 'just' and 'unjust' legal acts. Yet he needs to persuade the judges that his references to these laws are relevant for the case. This, in turn, requires an extensive interpretation in each case, since the statutes he mentions are

ἀδικία and ἐκόν / ἄκον distinction': Kasai (2010) 124.

⁴⁰⁸ It is not entirely clear what Kasai means by ἐκόν when he writes that 'wrongs which cannot be encompassed by law are those without ἐκόν': the intention of the legislator or that of the wrongdoer. Aristotelian *epieikeia* is certainly related to both, but in the speeches discussed in Kasai's essay it apparently refers to the intention of the addressees of a law (rather than the legislator). Now, if Kasai takes it to refer to the legislator's intention, which can be justified on the basis of Aristotle's description of the character of *epieikeia*, then there is no connection between that and Aristotle's definition of wrongdoing or the argument of the speeches. If, however, ἐκόν means here the wrongdoer's intention as it appears in Aristotle's definition of wrongdoing, then it does not fit very well with the purpose of 'negative' *epieikeia*, for it is clearly not meant to punish harms done without intention. Moreover, Kasai seems to be too quick in establishing links between some of Aristotle's passages and those of the speeches on the basis of the occurrence of certain expressions.

⁴⁰⁹ This may be due to the fact that the examples where *jori* appears in legislation date from the 1870s, i.e. from a transitional stage of Japanese codification, in which the modern Western principle of *nullum crimen sine lege* did not yet appear: cf. Kasai (2010) 125.

⁴¹⁰ See Harris (2013a) 205.

apparently meant to cover different situations.⁴¹¹

Another case, in which even the problem of how the legislator's intent can be expressed comes to the surface is Lysias' speech *Against Theomnestus* (or. 10). There, the speaker is the plaintiff, who accuses Theomnestus of having used one of the *aporrhēta*. The defendant, he anticipates, may argue that he did not actually use the forbidden word 'murderer' (ἀνδροφόνος), but merely said that the speaker 'killed his father' (τὸν πατέρα ἀπεκτονέναι, 10.6). The legislator's intention is, according to the plaintiff, completely clear, and is related to the meaning of the words rather than their forms. It would be unreasonable to expect from the legislator to list all the synonyms (πολὺ γὰρ <ἄν> ἔργον ἦν τῷ νομοθέτῃ ἅπαντα τὰ ὀνόματα γράφειν ὅσα τὴν αὐτὴν δύναμιν ἔχει). Rather, he expressed his intention concerning all the similar words by mentioning just one (περὶ ἑνὸς εἰπὼν περὶ πάντων ἐδήλωσεν, 7).

In both cases, the final aim of the speakers is to show that the defendant had the wrongful intent, and that therefore the law that forbids some similar behaviour should be applied. By doing so, they urge the judges to go beyond the written law in terms of its letter but not its spirit. *Epieikeia*, on the one hand, makes

⁴¹¹ Epicrates, the speaker, cites four laws to show that the validity of contracts may be challenged in case of fraud. The first prohibits lying on the market. While their contract was clearly not about a market sale, Epicrates says that the fraud took place 'in the marketplace', for it was there that the defendant, Athenogenes gave insufficient information concerning the debts attached to the workshop he sold. The second law is about the deficiencies of slaves, which the seller has to disclose before making a contract, for otherwise the transaction can be cancelled by the buyer. Here again, it requires some efforts from Epicrates to show why this provision is relevant for the selling of a workshop. He does so with the help of an argument *a fortiori* in the case of bad health, the buyer only loses the price of the slave, whereas the 'deficiency' of Midas, the slave he bought, may result in Epicrates and his friends losing all their money. The third reference seems to be the most far-fetched one, as it is to a law that sets the criteria for the legitimate birth of children, providing that the mother has to be married according to the law. The emphasis, Epicrates argues, is on the lawful circumstances of the betrothal, i.e. the parties' expression of consent. Finally, he cites the law about testaments, which sets limits to the freedom of making testaments in cases where the testator 'is affected by old age, illness or insanity' or if he is 'influenced by a woman or imprisoned or otherwise coerced'. Here, Epicrates' point is that he was misled by Antigona, a *hetaira*, who he thinks acted according to Athenogenes' plan to make the impression that Epicrates had to arrange the sale in haste.

sure that only wrongdoers are punished, but on the other hand also that no wrongdoing goes unpunished.

6 Topics of Magnitude (Chapter 14)

Having finished with the specific topics of judicial rhetoric, in Chapter 14 Aristotle turns to the judicial application of the common topic of magnitude⁴¹² and gives a list of possible factors that can make an unjust act (ἀδίκημα) a greater one (μεῖζον).

The first type of argument is based on the depravity of character that is reflected by the wrongful act: an ἀδίκημα is greater if it is due to a greater degree of *adikia*. It is for this reason, Aristotle adds, that the smallest wrongs (in terms of the harm done) may appear very grave ones (τὰ ἐλάχιστα μέγιστα, 1374b 25), as shown by the example of a certain Melanopus, who allegedly stole three sacred half-obols (25–27). From the subsequent explanation it becomes clear that what matters in such cases is the potentiality (ἔστιν δὲ ταῦτα ἐκ τοῦ ἐνυπάρχειν τῇ δυνάμει, 27–28) of committing greater injustice, and such a potentiality is demonstrated by the fact that Melanopus did not hesitate to steal something sacred.⁴¹³

Another way of showing the graveness of the wrongful act is by focusing on the harm done (ἐκ τοῦ βλάβους, 30). The first of these arguments compares the harm to the possible punishments, claiming that none of the latter would be great

⁴¹² In Chapter 3, Aristotle explains that the question of magnitude is common to all branches of rhetoric: ἅπαντες, καὶ ἐπαινοῦντες καὶ ψέγοντες, καὶ προτρέποντες καὶ ἀποτρέποντες, καὶ κατηγοροῦντες καὶ ἀπολογοῦμενοι, οὐ μόνον τὰ εἰρημένα δεικνύναι πειρῶνται, ἀλλὰ καὶ ὅτι μέγα ἢ μικρὸν τὸ ἀγαθὸν ἢ τὸ κακόν, ἢ τὸ καλὸν ἢ τὸ αἰσχρόν, ἢ τὸ δίκαιον ἢ τὸ ἄδικον, ἢ καθ' αὐτὰ λέγοντες ἢ πρὸς ἄλληλα ἀντιπαραβάλλοντες (1359a 16–22). Cf. Book I, Chapter 7, where the topic is discussed at a much greater length, in connection with deliberative rhetoric (1363b 5–1365b 19), and Chapter 9, where some of the topics are applied to epideictic subjects.

⁴¹³ This links back to the topic of *epigramma*, where the distinction between theft and sacrilege is mentioned (1374a 4–5) with the general explanation that ‘in all such cases the question at issue is whether a person is unjust and wicked or not unjust’ (9–11).

enough to match the former (30–31), while the second one emphasises the irreparability of the wrong (31–32). The third argument, based on the claim that the victim cannot bring a lawsuit against the perpetrator, appears as a sub-case of the second, for ‘a trial and punishment are a form of healing’ (32–33).⁴¹⁴

In addition to the harm done directly, there is a possibility that further harm is caused by the unjust act, for example if the victim ‘inflicted some great punishment on himself’ (34–35). In such a case, the argument can be made that the perpetrator should be punished to the extent of the victim’s suffering (1375a 1–2). This argument is interesting for two reasons at least. First, because it the first one that clearly goes beyond the act itself, and consequently beyond the perpetrator’s intention and character,⁴¹⁵ focusing on the indirect, and probably unintentional, consequences of the wrongdoing.⁴¹⁶ Second, because it is also here that the question of punishment is first mentioned in the chapter.

The following arguments are again related to the unjust act. The first group of them focuses on the uniqueness of the wrongdoing, pointing out that the perpetrator was the only one, the first, or one of the few (μόνος ἢ πρῶτος ἢ μετ’ ὀλίγων, 2) to commit a certain act of injustice. A similar argument is based on the social consequences, i.e. the fact that new means of prevention and punishment (κωλύοντα καὶ ζημιοῦντα) were invented as a response to the act (4–6).

The circumstances of perpetration form the basis of another group of

⁴¹⁴ This sort of argument is closely related to the arguments based on the characteristics of the victim, described in Chapter 12.

⁴¹⁵ Arguably, even those arguments that focus on the act rather than the intention are somehow connected to the perpetrator’s attitude, implying that the person who commits a grave crime must be of evil character. Cf. Grimaldi (1980) 308 *ad* 1374b 24 (2).

⁴¹⁶ An interesting consideration concerning punishment determined according to the harm done is mentioned at the end of the list of deliberative topics: οὐκ ἴση ζημία, ἂν τις τὸν ἑτερόφθαλμον τυφλώσῃ καὶ τὸν δὺ’ ἔχοντα· ἀγαπητὸν γὰρ ἀφῆρηται (1365b 17–19). The Locrian law containing that provision is quoted in Dem. 24.140–141, cf. Kennedy (2007) 72, note 153. In such a case, the harm reaches beyond the action because of the specific condition of the victim.

arguments. Repeated wrongdoing (3), brutality (θηριωδέστερον, 6)⁴¹⁷ and premeditation (προνοία, 7)⁴¹⁸ make the injustice greater, as does the fact that the act took place before the court (e.g. in case of perjury, 11–12), which is a display of shamelessness and invokes, again, the potentiality of further wrongdoing (12–13).

A third group of arguments relies on the judgements of the audience (ὁ οἱ ἀκούοντες φοβοῦνται μᾶλλον ἢ ἐλεοῦσιν, 7–8) or the society in general (ἐφ’ οἷς αἰσχύνη μάλιστα, 13).

Finally, there are arguments centred on the norms violated. In some cases the perpetrator violates a variety of rules (e.g. by ‘breaking oaths, handshakes, promises, marriage vows’, 9–10), which is πολλῶν [...] ἀδικημάτων ὑπεροχή (10–11),⁴¹⁹ in others the same act is unjust for two reasons (e.g. when harming one’s benefactor, one also fails to requite the favours received, 14–15). The two last items of the list are a pair of *dissoi logoi*: the first one claims that it is worse to violate an unwritten law, for it is only against this kind of rule that one can act autonomously, revealing one’s moral character (15–17), while the second one says, *a fortiori*, that ‘one who does wrong despite his fears and despite the existence of punishments would also do wrong that did not incur punishments’ (18–20).

The ‘magnitude’ of wrongdoing is an obvious question for arguments concerning the punishment. In the orators, it is also often used to emphasise the responsibility of the judges in protecting the polis against those committing serious crimes.⁴²⁰ Moreover, such arguments may provide a backing for arguments from fairness, by showing e.g. that the punishment provided for by the law is not

⁴¹⁷ Cf. the concept of *syngnōmē*, which covers the pardoning of *ta anthrōpina*, see 1374b 10–11, and esp. *EN* 1136a 7–9.

⁴¹⁸ On the concept of *προνοία* in Athenian law, see Harris (2004b).

⁴¹⁹ The text does not make it clear whether this happens by a single act or several ones, cf. Grimaldi (1980) *ad loc.*

⁴²⁰ See Navarre (1900) 305–311, for a collection of examples.

proportionate to the offence (and that, therefore, the legislator certainly did not intend it to be imposed for actions like that of the defendant).

7 Non-technical Proof in Judicial Rhetoric

As the last group of specifically judicial topics,⁴²¹ in Chapter 15 (1375a 22–1377b 12), Aristotle deals with the topics related to the *πίστεις ἄτεχνοι* mentioned in Chapter 2 (1355b 35–39). There he said that this sort of proof is ‘not provided by us but pre-existent’ (*προϋπῆρχεν*) and has to be used (*χρήσασθαι*) rather than invented (*εὐρεῖν*).⁴²² As the discussion here shows, that means that non-technical proof is made to support the speaker’s argument with the help of technical proof.⁴²³

Aristotle distinguishes five groups of topics, corresponding to the five kinds of ‘non-technical proof’: laws (*νόμοι*), witness testimonies (*μάρτυρες*), contracts (*συνθήκαι*), testimonies of slaves given under torture (*βάσανοι*), and oaths (*ὅρκοι*).⁴²⁴ The method of discussion is in accordance with Aristotle’s approach to persuasion summarised in the introductory chapter as *ἔτι δὲ τὰναντία δεῖ δύνασθαι πείθειν* (1355a 29–30), as he examines the possible uses of the topics for both sides of a legal debate.⁴²⁵

⁴²¹ 1375a 23–24: ἴδια γὰρ αὗται τῶν δικανικῶν. Cf., however, 26–27 and 1376a 1–8, on which see nn. 131 and 150 below.

⁴²² Cf., however, Carey (1994) discussing evidence from the Attic orators for the creative shaping of non-technical proof.

⁴²³ Carey (1994) 96.

⁴²⁴ At 1355b 37, Aristotle mentions *μάρτυρες*, *βάσανοι*, and *συγγραφαί* (meaning the same as *συνθήκαι*) only, indicating however that the list is by no means a complete one (*καὶ ὅσα τοιαῦτα*).

⁴²⁵ Cf. Kennedy (2007) 102, and Rapp (2002) vol. 2, 509–510 *ad* 1375a 25–29, who rightly challenges the view of Arnhart (1981) 108 that the topics related to laws refer to situations where ‘neither argument is the stronger’.

7.1 Laws

The first group of topics is those related to laws,⁴²⁶ and within that group Aristotle first examines the topics to be used in a situation where ‘the written law is against one’s case’ (ἐὰν μὲν ἐναντίος ᾦ ὁ γεγραμμένος τῷ πράγματι),⁴²⁷ and is followed by those that may be useful when ‘the written law is favourable to one’s case’ (ἐὰν δὲ ὁ γεγραμμένος ᾦ πρὸς τὸ πρᾶγμα).

The individual topics are introduced by an opposition (1375a 28–29) of written law and laws that are (1) common, (2) fairer, and (3) more just (τῷ κοινῷ χρηστέον καὶ τοῖς ἐπιεικεστέροις καὶ δικαιότεροις). Of the three adjectives, (1) seems to refer to the universal (natural) laws, while (2) and (3) have to be taken together to describe justice as *epieikes*,⁴²⁸ thus reflecting the division of laws we find at the beginning of Chapter 13.⁴²⁹

⁴²⁶ Aristotle speaks of the use of laws ‘in exhorting and dissuading, accusing and defending’ (1375a 26–27), which seems puzzling in the light of his statement that non-technical proof is specific for judicial rhetoric (23–24). The suggestion of Mirhady (1991), endorsed by Kennedy (2007) 103, note 246, that there is some space for ‘political deliberation’ in terms of the validity of a law within a judicial speech may or may not be true, but that would not be a case of προτρέποντα καὶ ἀποτρέποντα at any rate. A more convincing explanation is that of Grimaldi (1980) 318–319 *ad loc.*, who writes that ‘the atechnic proofs may be proper to judicial rhetoric but they are not exclusive to it’. One may think of quasi-judicial speeches in deliberative contexts, as e.g. in the Mytilenean Debate (Thuc. 3.37–48), on which see Harris (2013a) 320–334. On arguments from (in)justice in the speech, see also Heath (1990) 388–389.

⁴²⁷ Cf. my interpretation of *pragma* in the phrase ‘*deixai to pragma*’ (1354a 27–28) above in ch. II, esp. sect. 1.1.2. Interestingly, 1375a 28 provoked a much livelier debate among the interpreters. Grimaldi (1980) 319 *ad loc.* (2) challenges what he sees as the majority view and takes *pragma* to mean ‘that which took place, the actual fact, the specific action at issue’. He is followed by Kennedy in his translation (2007) 103–104: ‘if the written law is contrary to the facts’ and ‘if [...] the written law applies to the facts’. Rapp (2002) 510–511 *ad* 1375a 25–29 rightly argues that the passage 1375a 29–b 5 does not confirm Grimaldi’s interpretation (in fact, 1375b 13–14, with its comparison of the law to the πράγματα ἐφ’ οἷς ἐτέθη ὁ νόμος, would make a better, albeit still not convincing, argument) and that here Aristotle gives no criteria for deciding whether the use of a specific argument is justified in a given case (because it is in accordance with the facts) or not. What remains for the morally sensitive orator is, again, Aristotle’s caveat that knowing the arguments of both sides does not mean one should argue for every case: οὐχ ὅπως ἀμφοτέρω πρᾶττωμεν (οὐ γὰρ δεῖ τὰ φαῦλα πείθειν) (1355a 30–31).

⁴²⁸ The reading καὶ τοῖς ἐπιεικέσιν ὡς δικαιότεροις, preferred by Kassel (1976) and Cope (1877) makes this even more obvious. See Grimaldi (1980) 319–320 *ad* 1375a 28 (3), and 29 (1)–(2). See also Rapp (2002) vol. 2, 511 *ad* 1375a 28 and 29.

⁴²⁹ 1373b 4–6: λέγω δὲ νόμον τὸν μὲν ἴδιον, τὸν δὲ κοινόν, ἴδιον μὲν τὸν ἐκάστοις ὠρισμένον πρὸς αὐτούς, καὶ τοῦτον τὸν μὲν ἄγραφον, τὸν δὲ γεγραμμένον, κοινὸν δὲ τὸν κατὰ φύσιν.

The first topic (1375a 29–31) offers an interpretation of a phrase from the judges’ oath, γνώμη τῇ ἀρίστῃ, opposing this ‘best consideration’ with the mechanical application of written law (τὸ μὴ παντελῶς χρῆσθαι τοῖς γεγραμμένοις). The second topic (1375a 31–b 2) specifies the opposition mentioned above, highlighting the difference between the permanence of fairness (τὸ ἐπιεικές) and the universal laws (ὁ κοινός) on the one hand and the mutability of written law on the other, quoting Sophocles’ *Antigone* (456 and 458, the latter with a slight modification). The third topic (1375b 3–5) distinguishes between true and apparent (τὸ δοκοῦν) justice, associating the letter with the written law that is found wanting. It is within this framework that the fourth topic (1375b 5–6) compares the judge to an assayer of silver (ἀργυρογνώμων) who has to distinguish what is genuine from what is counterfeit. The fifth topic (1375b 7–8) finishes the series by saying that it is characteristic of better people to apply unwritten rather than written law.

A second group of topics focuses on contradictions between different laws or within one law (1375b 8–11), and the ambiguity of the text (1375b 11–13). The last topic (1375b 13–15) can be used to show that a specific law is outdated as the conditions that once motivated the legislator have changed.

For our discussion here it is the first five topics that are of particular importance, as they are based on an explicit opposition of written and unwritten law in general, with *epieikes* appearing on the side of the latter. What makes these topics puzzling is that they reflect an approach completely different from what we find in Chapter 13. There, *epieikes* was opposed to written law only in the sense of a tension between the abstract justice embodied in the rule and the particular justice of the individual case, and the legislator’s intention was by no means challenged. Here, however, it is the binding force of written law that is questioned,

and in some of the topics this is formulated in general terms (others may be taken to regard the individual law referred to in a lawsuit).⁴³⁰

Moreover, one may wonder what chance of success these topics could have had if used before an Athenian court.⁴³¹ If an orator would have questioned the validity of written law, it would have been tantamount to denying the sovereignty of the Athenian people.⁴³² It may be for this reason that arguments based on them do not occur in any of the extant judicial speeches of Attic oratory.⁴³³

These considerations notwithstanding, the topics of Chapter 15 have been regarded by certain scholars as proof of Aristotle's identification of fairness with extra-legal considerations on the one hand⁴³⁴ and natural law on the other.⁴³⁵ This is usually linked to the claim that in contemporary legal reasoning there was much space for arguments not based on positive law.⁴³⁶ But their view concerning Aristotle is not sensitive to the problem of whether such topics could be successful in a legal procedure in Athens, for Aristotle can be just as well depicted as the philosopher whose ideas were ahead of his time.⁴³⁷ Discussing the whole complex would go beyond the limits of this chapter, but a look at the context in which the above topics appear in the *Rhetoric* is certainly worthwhile.

First, the topics are not meant to serve as sources for arguments from

⁴³⁰ The first (*gnōmē tē aristē*), second (stability vs mutability), and fifth (moral character) topics seem to be directed against written law *qua* written law. The third and fourth refer to the individual decision, so the opposition seems to be between the relevant statute and justice. The topics based on ambiguity, contradiction, and conflict of laws remain within the limits of written law. The last topic, directed against an (individual) obsolete law, may be taken to imply a reference to the legislator's intention.

⁴³¹ Cf. Carey (1996) 46.

⁴³² Cf. Harris (2006) 158.

⁴³³ Harris (2006) 163.

⁴³⁴ See e.g. Hurri (2013) 154–156.

⁴³⁵ See e.g. Clark (1957) 229, Miller (1991) 285. For further references see the overview of Burns (2011) 109–113.

⁴³⁶ Cf. sect. 5.7 above.

⁴³⁷ See e.g. Meyer-Laurin (1965) 52.

fairness. They show the possibilities of making an argument related to a statute that is used as evidence in a legal procedure. Their connection with *epieikeia* as a principle of statutory interpretation is that they make use of the opposition of written and unwritten law, and the definition of *epieikeia* as ‘justice beyond written law’.

Second, not even here does *epieikes* refer to anything like natural law.⁴³⁸ *Epieikes* occurs twice in these passages: once in the introductory opposition (as an adjective) and then in the topic contrasting the mutability of written law to the permanence of the universal laws and to the value of *epieikes*. Two things should be noted here. On the one hand, there is a juxtaposition of *epieikes* and universal laws (which may be interpreted as natural law) and the two are not used as synonyms. On the other hand, *epieikes* does not appear as a separate set of rules that would compete with positive law.

Third, Aristotle does not present the topics as expressing his own views but as sources for arguments for one side of a debate. After the more innocent topics of ambiguity and conflict of laws,⁴³⁹ he gives a list of topics for countering arguments directed against written law. These topics (1) offer another interpretation of γνώμη τῇ ἀρίστῃ,⁴⁴⁰ claiming that it does not allow for *contra legem* decisions but is to be regarded as a disclaimer on the part of the judges (1375b 16–18),⁴⁴¹ (2) oppose what is good in general to one’s individual good (1375b 19), suggesting that references to

⁴³⁸ Cf. Harris (2013b) 29 and 30.

⁴³⁹ As mentioned above, these do not question the validity of a statute. They do not even need to be made explicit in the sense of saying that the law is not quite clear or that it contradicts itself or another law. On the tacit use of ambiguity in oratory, see Harris (2006) 164–165. Cf. also Sickinger (2008) 101, with reference to Aesch. 3.40.

⁴⁴⁰ A third one is given in connection with witnesses (in favour of arguments from probability) at 1376a 18–19: ὅτι ἐκ τῶν εἰκότων δεῖ κρίνειν καὶ τοῦτ’ ἐστὶ τὸ ‘ γνώμη τῇ ἀρίστῃ’.

⁴⁴¹ This is the interpretation of the clause proposed by Harris (2013a) 109.

the former may not be honest,⁴⁴² (3) state that a law that is not used is like non-existent (1375b 20), (4) compare the law to a medical prescription, which should be observed at all events, for disobedience may become a habit that is more dangerous than a mistake of the doctor (1375b 20–23), and (5) emphasise that *contra legem* adjudication is prohibited by respected laws (1375b 23–25). These topics seem to have much more persuasive potential within the context of contemporary Athens than their counterparts,⁴⁴³ and the necessity of applying written law is a recurrent theme in Attic judicial orations.⁴⁴⁴

To sum up, Aristotle’s presentation of the topics related to *nomos* as a non-artistic proof does not support any identification of *epieikeia* and natural law or any other sort of unwritten legal rules.⁴⁴⁵ On the other hand, the topics serving as sources of arguments against the application of written rules do not stand on their own but are accompanied by another set of topics, from which arguments for the opposite can be gained. Thus, they cannot be taken to reflect Aristotle’s attitude to written law. Since no similar arguments can be found in Attic judicial oratory,⁴⁴⁶ they seem to be included for the sake of completeness. For the other kinds of non-artistic proof (witnesses, *basanoi*, contracts, and oaths), more plausible arguments can be made for either side of a legal debate on the basis of the topics listed in Chapter 15, and this may explain why it seemed necessary to add the counterparts

⁴⁴² Cf. Kennedy (2007) 104, note 250, who sees it as an opposition between the interests of the community and the individual litigant (cf. *sympheron* in the topic opposing true and apparent justice, at 1375b 3, and a similar topic in connection with contracts, at 1376b 29–30: ἔτι δὲ τὸ συμφέρον ὁρᾶν, εἴ που ἐναντιοῦται τοῖς κριταῖς). It may as well answer to the general contrasts between written and unwritten (*epieikes* and *koinos*) law, as it can also suggest that the latter is not likely to be represented by the position of one of the litigants.

⁴⁴³ See Carey (1996) 46.

⁴⁴⁴ See e.g. Aesch. 3.6–7, D. 20.93 (with reference to the authority of Solon), 24.24, Din. 1.17 (alluding to the Judicial Oath).

⁴⁴⁵ See also Stroux (1949) 19–20, note 19, with references to earlier literature.

⁴⁴⁶ Cf. Harris (2013a) 105.

of the topics that allow one to advocate the (strict) application of written law.

7.2 Witnesses

Turning to witness testimonies, Aristotle first offers a classification that covers a much broader scope of proof than the modern understanding of ‘testimony’. He classifies these as follows. There are ancient and recent witnesses, and of the latter some are taking a risk by giving testimony but some are not. Ancient witnesses comprise ‘the poets and other well-known persons whose judgments are clear’, who can testify to past events. The next group, oracles (χρησμολόγοι), seem to be mentioned because of the opposition of past and future, as these are witnesses about τῶν ἐσομένων. Otherwise they are somewhat out of place in a judicial speech that is by definition about the past (cf. 1358b 2–5), and this is indirectly supported by the example Aristotle gives: that of Themistocles using the oracle to persuade the Athenians about the necessity of building ships (1376a 1–8), which is about deliberation rather than adjudication.⁴⁴⁷ To a certain extent, the same applies to the next group, proverbs, for although they are usually atemporal and may well be used by a forensic orator, Aristotle’s examples show them at work in deliberative matters.⁴⁴⁸ The classification concludes with the questions appropriate for each kind of witnesses. While it is only recent witnesses sharing the risk of perjury who can give information on the facts of the specific case (εἰ γέγονεν ἢ μή, εἰ ἔστιν ἢ μή, 13), they are less reliable as regards the ‘quality’ of the act committed (περὶ δὲ τοῦ ποῖον [...] εἰ δίκαιον ἢ ἄδικον, εἰ συμφέρον ἢ ἀσύμφορον, 13–14).⁴⁴⁹ In terms of the

⁴⁴⁷ Cf. Grimaldi (1980) 318–319 *ad* 1375a 23.

⁴⁴⁸ Their presence in the list can still be justified by their similarity to ‘real’ testimonies.

⁴⁴⁹ ‘Quality’ here means the general quality of a certain kind of action (e.g. that theft is unjust) rather than whether the specific action at issue qualifies as just or unjust, for the latter depends largely on the facts of the case. Cf. ch. II, sect. 1.3 above.

latter, ‘outsiders’ and ancient witnesses are a better source.

Aristotle then presents two topics about the use of witnesses in general. Speakers who do not have any testimony to support their case can question the reliability of witnesses, arguing that ‘judgment must be made on the basis of probabilities (ἐκ τῶν εἰκότων) and this is what is meant by “γνώμη τῇ ἀρίστη” (18–19), or insinuating that witnesses are liable to corruption (19–21). Those grounding their claims on testimonies can, in turn, argue that probabilities cannot be brought to trial (οὐχ ὑπόδικα τὰ εἰκότα, 22)⁴⁵⁰ and that arguments without testimonies are not sufficient for a thorough investigation of the case (22–23).

It can be hardly the case, Aristotle adds, that one does not have testimonies at one’s disposal. Testimonies are either about the speaker or his opponent, and either about the case itself (περὶ τοῦ πράγματος) or the characters (περὶ τοῦ ἥθους, 25) of those involved. If one has got nothing to support the *pragma*, one can still bring in testimonies about the character of some of the parties, to show the *epieikeia* of the one or the *phaulotes* of the other (26–29). For other possible considerations Aristotle refers to the topics discussed in the previous chapters.⁴⁵¹

7.3 Contracts

In the discussion of contracts (συνθήκαι), Aristotle highlights the similarities with the topics related to witnesses on the one hand and laws on the other. In terms of the ‘credibility’ of a contract,⁴⁵² one may use the same topics as with the witnesses

⁴⁵⁰ The expression ὑπόδικα answers the last argument directed against testimonies (οὐχ ἀλίσκεται τὰ εἰκότα ψευδομαρτυριῶν, 20–21): probabilities cannot be caught at perjury because they are not liable to prosecution.

⁴⁵¹ See, also on the use of the word τόπων, Grimaldi (1980) 333 *ad* 1376a 32 (1); Kennedy (2007) 106, note 258. Cf., however, Rapp (2002) 517–518 *ad* 1376a 29–33 on the questions raised by Aristotle’s qualification ἐξ οἷων περ καὶ τὰ ἐνθυμήματα λέγομεν (32).

⁴⁵² See 1376a 34–b 2: ἢ πιστὰς ποιεῖν ἢ ἀπίστους—ἐὰν μὲν αὐτῷ ὑπάρχῃσι, πιστὰς καὶ κυρίας, ἐπὶ δὲ τοῦ ἀμφισβητοῦντος τὸν ἀντίον, which reflects that a ‘credible’ contract is accepted as ‘valid’,

(1376b 2–5). As for the contracts that are agreed to be valid, and therefore need amplification or downplaying,⁴⁵³ the parallel is with the topics about laws (see esp. 15–17).

The topics of amplification focus on the consequences of disobeying contracts. The first ones deal with the relationship between contracts and laws: a contract is a specific and particular law (νόμος ἐστὶν ἴδιος καὶ κατὰ μέρος, 7–8), and the validity of lawful (κατὰ νόμους) contracts stems from the laws (8–9). Moreover, as laws are something like contracts (συνθήκη τίς),⁴⁵⁴ questioning the validity of a contract or abolishing it (ὅστις ἀπιστεῖ ἢ ἀναιρεῖ) means annulling (ἀναιρεῖ) the laws (9–11).⁴⁵⁵ The last topic of the group looks at the relationship between contracts and the order of human transactions: as contracts are the basis of most human obligations, i.e. those that are voluntary (τὰ πολλὰ τῶν συναλλαγμάτων καὶ τὰ ἐκούσια),⁴⁵⁶ if the validity of contracts is not accepted, transactions (ἡ πρὸς ἀλλήλους χρεία τῶν ἀνθρώπων) will be at peril (11–14).

The topics directed against unfavourable contracts are, indeed, similar to those against laws. There are, however, additional arguments drawn from the difference between the levels of laws and contracts. The first one is an example of

i.e. one that actually exists.

⁴⁵³ Pace Grimaldi (1980) 334 *ad* 1376b 4, who claims that '[o]ur phrase πιστὰς ποιεῖν ἢ ἀπίστους is presented as a second set of alternatives to αὐξεῖν ἢ καθαίρειν, but, in fact, it is a further explanation of αὐξεῖν ἢ καθαίρειν: this is what one does if one strengthens or weakens the importance of contracts.' As mentioned in the previous note, the first question is about the existence (i.e. the validity or, in rhetorical terms, the credibility) of the contract, while the second one concerns its importance.

⁴⁵⁴ See also *Pol.* 1280b 10, cf. Grimaldi (1980) 335 *ad* 1376b 10.

⁴⁵⁵ Beyond the explanation offered by Grimaldi (1980) 335 *ad loc.*, that '[t]he force of this argument, such as it is, resides in the similarity of contract to law, and, consequently, the need to respect contract as we respect law' (which seems to apply rather for the previous arguments at 1376b 7–9), this topic seems to be similar to an argument of the German jurist Rudolf von Jhering, who in his *Kampfung Recht* (1872) famously claimed that hesitation to enforce one's rights (*subjektives Recht*) may lead to the *desuetudo* of the laws (*objektives Recht*) granting these rights. With that in mind, the argument seems to suggest that whereas it is the law that makes the contract valid and not *vice versa* (see 1376b 8–9), attacking a contract may pose a threat to the laws behind that contract.

⁴⁵⁶ Grimaldi (1980) 336 *ad loc.* rightly points to the division of obligations at *EN* 1131a 1–9.

such an argument *a fortiori*: if one should not obey a wrong law, why should one necessarily obey contracts (17–19). The next topics oppose justice and contracts much in the same vein as those against written law. The judges, as umpires (βραβευτής) of the just, should look at what is more just rather than the contract alone (19–21). Justice, as it comes from nature, cannot be perverted by deceit or compulsion, while contracts can (21–23). A further topic is that of conflict with laws (written or ‘common’, from the *polis* or from abroad) or other (earlier or later) contracts (24–29). A final consideration may be that of usefulness (τὸ συμφέρον), as the contract may be somehow against the interests of the judges.

7.4 Testimonies of Slaves

Testimonies given by slaves under torture (βάσανοι) essentially belong to testimonies (μαρτυρίαι τινές), Aristotle argues, and therefore their importance can be amplified in the same way, with the addition that their credibility stems from compulsion (ἀνάγκη τις), which makes these ‘the only genuine testimonies’ (ἀληθεῖς μόναι τῶν μαρτυριῶν) (1376b 31–1377a 1).

Arguments against this kind of proof are essentially based on its lack of reliability that is due, again, to the element of compulsion. Those who do not want to tell the truth cannot be forced to tell it, while torture makes people more likely to tell lies just to stop being tortured (3–5).⁴⁵⁷

Here Aristotle seems to be inclined to disapprove of βάσανοι in general. This is reflected by the phrase τὰ ληθῆ λέγων (2), which refers to the arguments against testimonies under torture, and also by the fact that he recommends that the speaker mention well-known examples of false testimonies thus extracted (5–6).

⁴⁵⁷ 1377a 6–7d essentially repeats the argument and is considered by most editors as a later addition. See Grimaldi (1980) 340 *ad loc.*

7.5 Oaths

The last mentioned kind of non-technical proof is oaths (ὄρκος), for which Aristotle distinguishes four cases: the speaker either ‘gives and takes an oath, or does neither, or does one or the other of these’, i.e. he either gives but not takes, or takes but does not give an oath (1377a 8–10). These cases are all composed of two basic actions (cf. 1377a 29–b 3): giving and taking an oath, and Aristotle gives topics for and against both, thus making four groups of arguments.

Not giving an oath to the other party can be justified either by expressing doubts as to the reliability of oaths in general (12), or the reliability of the opponent in particular. In the second case, the argument does not insinuate that the opponent would lie, but that he would not give an oath in return, thinking that the judges would vote against the person who did not take an oath (12–15).

There are two topics to support not taking an oath, too. The first one links back to the claim that it is more advantageous in a trial to take the oath, using that to attribute the decision not to take it to virtue rather than the risks of committing perjury (15–19). The second argument (19–21) is introduced by a quotation from Xenophanes of Colophon, according to which ‘the challenge [to take an oath] is not equal for an irreligious man in comparison with a religious one’ (οὐκ ἴση πρόκλησις αὕτη τὰσεβεῖ πρὸς εὐσεβεῖ), then explained by a simile of ‘a strong man calling out a weak one to hit or be hit’ (εἰ ἰσχυρὸς ἀσθενῇ πατάξαι ἢ πληγῆναι προκαλέσαιτο). Both formulations suggest that the parties of the trial are in unequal positions, and they also insinuate that the other party is *asebes*.

The speaker taking the oath can reformulate some of the arguments mentioned previously, saying that ‘he trusts himself not the opponent’ (22, cf. 14–

15), or that ‘it is equal if the irreligious man gives an oath and the religious one swears it’ (22–24, cf. 19–20). A third possible argument would be that one should not hesitate to take an oath himself if one expects the judges to decide under an oath (24–25).

Giving an oath can be, again, accompanied by an argument of *eusebeia*, adding that in case the gods decide the case one should not ask for other judges (25–28), or the last argument of the previous group (28–29, cf. 24–25).

After the cases of giving and taking or refusing to give or take oaths, and their combinations, Aristotle looks at the possibility of oaths taken previously by the speaker or the opponent, which contradict the oath now taken. If the contradiction is on the part of the speaker, he should deny having committed perjury with an argument from fairness, based on definitions: perjury, *qua* crime, must be voluntary, while compulsion and deceit exclude voluntariness (3–5). In a more poetic formulation, ‘committing perjury is with the mind and not with the tongue’ (6–7). If, however, it is the opponent whose oaths contradict one another, the importance of oaths should be amplified. One can either make an argument *a fortiori*, saying that ‘he who does not abide by what he has sworn overturns everything’, mentioning the situation of the judges in comparison (8–9), or focus on the comparison with the judges, who are expected to keep their oath, which is just what the opponent fails to do (9–10).

Conclusion

The aim of this chapter was to see how the arguments constructed from the ‘legal’ topics described in Aristotle’s *Rhetoric* work. In order to achieve this, the key elements of each type of argument had to be identified. As the analysis of the three

major types (arguments concerning the mental element, definition, and fairness) shows, the focus is constantly on the mental element of wrongdoing, and the discussion is structured by Aristotle's definition of wrongdoing.

According to the definition, wrongdoing happens when somebody does wrong intentionally and thereby breaks the law. Arguments related to the mental element described in Chapters 10–12 are meant to furnish proof that a certain person had (or did not have) sufficient motives for committing a specific unlawful act. Thus, while the topics concentrate on general values and personal characteristics of various groups of persons, in a final analysis they all contribute to establishing the probability that something has been done intentionally, for some of the reasons related to them.

Turning to arguments from (legal) definition, Aristotle makes explicit the importance of intention, saying that it is the criterion that allows distinguishing between different wrongful acts or an act that is wrongful and one that is not. As one example (the difference between theft and sacrilege) makes clear, the intention of the perpetrator has to encompass all the relevant circumstances of the action in order that the latter qualify as a specific unlawful act. As in the case of arguments from probability, Aristotle does not discuss here legal definitions that are not related to intention, or rather, he subordinates other aspects of definitions to the question of intention.

The major part of the chapter has been devoted to problems related to arguments from fairness. As it has been rightly pointed out in recent scholarship, Aristotelian *epieikeia* is not serving the aim of introducing extra-legal considerations into the legal debate, nor is it intended to encourage *contra legem* decisions. Rather, it allows for decisions that fulfil the aim of the law, the service of justice, even in cases where the written law is imperfectly formulated (it is only in

this sense that *epieikeia* is related to natural law, by helping positive law function according to its proper nature). In other words, *epieikeia* ensures that *only* those who do wrong intentionally and in violation of the law get punished.

The way rhetorical arguments can contribute to a just decision is through offering an adequate interpretation of the written law that has to be applied for the given case. As Aristotle's example shows, this essentially means a restrictive interpretation of the terms used in the legal definition of a wrongful act. Such an interpretation needs justification, which can be found in the legislator's intention. As surviving speeches from Attic oratory show, the legislator's intention is reconstructed by orators with reference to written law not directly relevant for the case. This way, the speaker can argue for a fair application of the law without urging a *contra legem* decision. After this reconstruction, also the problem of another aspect of *epieikeia* has been raised, which ensures that *all* those who do wrong intentionally and in violation of the law get punished. This, in turn, requires an extensive interpretation of the law, which makes it applicable for situations not covered by its original formulation. Although Aristotle does not mention this possibility explicitly, and the example he gives is one where a restrictive interpretation of the law is called for, his description of *epieikeia* does by no means exclude arguments that work in this direction. As I hope to have shown, arguments of this sort do occur in judicial oratory together with the other characteristics of references to fairness, which I think supports an inclusive understanding of Aristotelian *epieikeia*.

The discussion of the topic of magnitude in connection with judicial rhetoric also attests Aristotle's preoccupation with the problem of intention, as the majority of arguments listed focuses on the magnitude of *adikia* rather than just the harm caused.

The final chapter of Book I about the arguments related to ‘non-technical proof’ has proven to be important mainly because of the alleged connections it has to the problem of *epieikeia*. In this respect, it can be observed that the arguments directed against written law are relevant for the interpretation of the passages dealing with arguments from fairness only insofar as they show that Aristotle does not link *epieikeia* to natural law in a sense of a set of unwritten rules. The only connection between fairness and natural law is that the former helps written law to fulfil its function of serving justice, that is to say, to live up to its nature.

The way Aristotle approaches the arguments of judicial rhetoric clearly show the direction in which he seeks to go beyond Plato’s views. As seen in the *Laws*, Plato’s efforts to make the legal system a properly working one are directed at improving statutory law. It is due to his *Rechtspolitik* that (ideally) there remains no scope for judicial rhetoric. Aristotle, in turn, shows how argumentation can contribute to the functioning of the legal system even in those (necessarily existing) cases that are beyond the reach of legislation. By doing so, he offers some kind of a legal methodology that focuses on persuasion but is based on the analysis of legal concepts, thus showing the outlines of an early *Rechtsdogmatik*.

Chapter IV: The Analysis of Legal Issues

Introduction

Rather than looking back to Plato, this final chapter examines the possible links between the *Rhetoric* and a part of the rhetorical doctrine that appeared in a fully developed form in Hellenistic textbooks. The system of issues (*staseis*) was used in ancient schools of rhetoric to identify the core of a (legal) debate, i.e. to determine the basic issue where the claims of two opposing parties contradict each other, according to which the whole of the argument should be organised.⁴⁵⁸ The first textbook to offer such a system was, according to later tradition, the work of Hermagoras of Temnos. His textbook did not survive, but some parts of it, and the doctrine of *staseis* in particular, can be reconstructed on the basis of testimonies and fragments preserved in later treatises.⁴⁵⁹ While the doctrine of issues was a product of later Hellenistic rhetoric, it is a recurrent question of modern scholarship how far it was anticipated by earlier authors, most eminently by Aristotle.

While it is often quite difficult to reconstruct certain parts of Hermogenes' doctrine of *staseis* on the basis of texts offering different interpretations, some of its functions can be identified. From the perspective of the participants of the debate, a

⁴⁵⁸ The most recent overview of scholarship on the *staseis* is Hoppmann (2007). The most detailed discussion of relevant sources is Calboli Montefusco (1986), complementing the exclusively systematic overviews of Lausberg (1960) 64–138 and Martin (1974) 28–51. A more theoretical approach is that of Braet (1984). Still useful, with examples from Greek and Roman oratory for each *stasis*, is Volkmann (1885) 38–108.

⁴⁵⁹ The most recent collection of the fragments and testimonies is Woerther (2012), replacing Matthes (1962). From earlier scholarship see Thiele (1893) and Jaeneke (1904). The most complete reconstruction of the textbook is still Matthes (1958). On the main sources of the reconstruction (Cicero's *De inventione*, the *Rhetorica ad Herennium*, Quintilian, the Pseudo-Augustinian *De rhetorica*, and Hermogenes) see Matthes (1958) 70–107. The reliability of the *De rhetorica* was supported e.g. by Barwick (1965), and recently challenged by Heath (2002), whose methodological suggestions seem to be followed by Woerther (2012) xxxix–xliii. Caveats about using Hermogenes' work for the reconstruction are formulated by Heath (2003) 2 and (2004) 5–6, with further references *ibid.* in note 4.

system of *staseis* provides a framework in which a given case could be analysed. Identifying the actual core or main issue of a controversy is the first step towards collecting the suitable arguments. Thus, the *staseis* play a role of signposts to the topics, as they determine which aspect of the case has to be supported by the speech. Yet they are not conclusive in the sense that they would prevent the orator from building up his own strategy: a given case can be approached from different angles and it is up to the person composing the speech which one he finds worth elaborating on.

In the teaching of rhetoric, the *staseis* may be – and were in fact – used as a didactic tool, which enables the pupils to scrutinise the argument of a speech, and to practice inventing their own arguments with the help of ‘a standard set of heads’.⁴⁶⁰ In later Hellenistic schools of rhetoric, determining the *stasis* corresponding to a given case or speech was an exercise commonly used. The development of various systems⁴⁶¹ may be, at least partly, due to the constant need for an easy-to-teach doctrine (other main incentives being philosophical considerations and legal development⁴⁶²).

Once the notion that the main issue of a case can be determined along the lines of *stasis* theory became generally accepted in school rhetoric, it provided theoretical underpinning to the practice of orators trying to influence their audience’s perception of the controversy. When arguing for their own conception

⁴⁶⁰ Heath (1995) 18. On *staseis* in the ancient curriculum, see Clark (1957) 73, 228–250 (in the context of *controversia*). On teaching their use in a 21st-century setting (with the help of Hermogenes’ textbook), see Heath (2007).

⁴⁶¹ From earlier literature, see the survey of Nadeau (1959a). Different systems are examined from a structural point of view by Heath (1994a); a historical overview is given in Heath (2004) chs 2–3.

⁴⁶² Cf. Heath (2003).

of what the dispute is about, they might find additional support in a part of the rhetorical knowledge they probably shared with other participants of the debate.⁴⁶³

Modern research approached the link between Aristotle and *stasis* theories from various angles. Looking at what Aristotle's works, apart from the *Rhetoric*, have to offer for a theory of issues in conceptual terms, scholars tried to identify possible influences on later doctrine.⁴⁶⁴ While these contributions offer meaningful ways of understanding *stasis* theory with the help of certain Aristotelian ideas and concepts, they do not offer any evidence for these influences in Hellenistic doctrine.

Others, focusing on the interpretation of the *Rhetoric*, also examined Aristotle's rhetorical doctrine with an eye on later authors, seeking to find in it passages that correspond to the description of single *staseis*. In almost every contribution, however, the caveat was made that one should not expect Aristotle to offer a complete doctrine of issues. As the author of the first modern commentary put it, 'the legal "issues", afterwards called *στάσεις* and status, appear in Aristotle in the embryo stage of *ἀμφισβητήσεις*, often referred to, never exactly defined, or employed as a well determined and recognised technical and legal classification.'⁴⁶⁵

This current of research pointed out two features of the treatment of issues in the *Rhetoric*, which can be regarded as characteristically Aristotelian. The first of these is that the issues Aristotle identifies are those of facts, qualities, and magnitude, which differs from the later standard set of facts, definition, quality,

⁴⁶³ Cf. Könczöl (2008) 28.

⁴⁶⁴ See especially Dieter (1950), Nadeau (1959b) with references to earlier literature, and more recently Marsh (2012).

⁴⁶⁵ Cope (1867) 397, similarly Navarre (1900) 261. See also Grimaldi (1980) 294 *ad* 1374a 1–2. A notable exception was F. Marx, who argued that Aristotle must have devoted a more thorough discussion to issue theory, which just did not survive: Marx (1900) 249, cf. Braet (1999) 416–417. Yet as Marx did not think the *Rhetoric* was composed by Aristotle himself (see e.g. Marx (1900) 241), this suggestion does not affect the general agreement on what can reasonably be expected of the work as we have it. Cf. Liu (1991) 53, and Braet (1999) 408, with further references.

and procedure. Second, while *stasis* theories usually regard the issues as a method of invention of arguments specific to judicial rhetoric, Aristotle repeatedly discusses the use of issues in epideictic and deliberative oratory as well. In addition to these points, it has also been argued that the discussion of issues in Book I of the *Rhetoric* differs significantly from that in Book III, the latter being more systematic on the one hand, and showing an awareness of the issues as ‘lines of defence’ in a legal case on the other.⁴⁶⁶ This difference is often discussed in connection with the question of the unity of the *Rhetoric*, and is considered to provide arguments for the view that Book III, a rhetorical treatise on its own, was added to the two ‘genuine’ books of the *Rhetoric* only by a later editor. A more conservative interpretation takes the same differences as signs of the development of Aristotle’s rhetorical ideas, which also suggest that Books I–II and III were written by Aristotle in different times.⁴⁶⁷

A third approach focuses on the place of issues within Aristotelian rhetoric. Within this current, even a sceptical view has been formulated, according to which Aristotle could not be interested in any doctrine of issues, his concept of invention being derived from the deliberative rather than the judicial branch of rhetoric. Thus, Aristotle’s conception of rhetoric would be simply incompatible with a theory of issues ‘understood as an exhaustive system of invention’ that is based on controversy.⁴⁶⁸ While one may be perfectly justified in contrasting the *Rhetoric* with later rhetorical theories which concentrate on forensic debates and systems of issues, it is difficult to see why the idea of controversy would be incompatible with

⁴⁶⁶ Cf. e.g. Thompson (1972), and Braet (1999) 419, with note 20.

⁴⁶⁷ See also Mirhady (2007b) 7, who speaks of an ‘almost universal agreement’ but points (*ibid.*, note 25) to Schütrumpf (1994) and remarks that ‘[t]he fact that the *Rh. Al.* concurs with the *Rhet.* in including stylistic issues also seems to weigh against an initial separation of book 3.’

⁴⁶⁸ Liu (1991) 59.

Aristotle's view of rhetoric. In fact, pointing out the core of a debate is, for Aristotle, of crucial importance as it makes rational persuasion possible.⁴⁶⁹

The last word on the question of issues in the *Rhetoric* to date is more sympathetic with the notion of Aristotle contributing to the theory of *staseis*, even if the more originally Aristotelian version of issues (developed in Book I, Chapter 3) seems not to have been followed by later authors.⁴⁷⁰

This chapter falls into two parts. The first one gives an overview of the relevant passages of the *Rhetoric* and seeks to identify the principles underlying Aristotle's treatment of issues, thus examining how the issues fit into the whole of the *Rhetoric*. Such a reconstruction may help to nuance the picture of 'Aristotle's unco-ordinated attempts to formulate a doctrine of stasis in the Rhetoric'.⁴⁷¹ I am going to argue that rather than trying to build any 'doctrine' of issues, Aristotle integrates them into his conception of rhetoric by re-interpreting what may have been commonplaces in contemporary rhetoric. As for the differences between the passages dealing with the issues in Book I and III, they seem to be due mainly to the different contexts, which complement one another by focusing on different aspects of the issues.

The second part looks at the possible sources of Aristotle's knowledge of the *staseis* as well as the influence Aristotle may have had on later authors. This happens mainly by way of comparison with the *Rhetorica ad Alexandrum* on the one hand, and the fragments of Hermagoras on the other. My contention here will be that the insights concerning the issues, which Aristotle (and Anaximenes)

⁴⁶⁹ See Walton (2003) 31 on the issues as criteria of relevance in argumentation.

⁴⁷⁰ Braet (1999). Speaking of 'two unco-ordinated attempts to formulate a doctrine of stasis in the Rhetoric', Braet argues that Books I–II and III, respectively, contain the traces of two variants of a system of issues, which are intended to serve different aims. For discussion see sect. 1 below.

⁴⁷¹ Cf. the previous note.

inherited from earlier doctrine were rather general ones, and Aristotle's contribution to the identification of single questions seems substantial. While the scarcity of evidence⁴⁷² does not allow us to see to what extent later doctrine was actually inspired by Aristotle, the possible influence of an Aristotelian tradition should not be underestimated.

1 Issues in the *Rhetoric*

Before discussing the issues in the context of the *Rhetoric*, it is in order here to give a brief outline of the structure and functioning of Hermagorean *staseis*.⁴⁷³

As far as Hermagoras' textbook can be reconstructed, he seems to have limited the domain of rhetoric to the 'political questions' (*politika zētēmata*). Within these, he distinguished definite and indefinite questions (*hypotheseis* and *theseis*). If an orator seeks to discuss a definite question persuasively, he has to identify the main issue (*stasis*) where the claims of two opposing parties contradict each other. Such contradictions may be of one of four types: (1) *stochasmos* – the question is whether there is any link between a person and an act (one of the parties claims that the other has done something, while the other denies this); (2) *horos* – the controversy is about the definition of the act (one of the parties claims that the other has committed a certain crime or injury, while the other claims that he committed something else); (3) *kata symbebēkos*⁴⁷⁴ – the dispute concerns the justification of the act (the person who has committed the act claims that he had some moral or legal reason to do what he has done, or tries to exculpate himself in

⁴⁷² Cf. Kennedy (1963) 264.

⁴⁷³ Here I follow Matthes (1958) 124–166 and 182–186.

⁴⁷⁴ Usually called *poiotes* (see Quint. *Inst.* 3.6.56 = T 26 (Woerther): 'qualitatem, quam per accidentia, id est κατὰ συμβεβηκός vocat [sc. Hermagoras]'), cf. Matthes (1958) 148. For the explanation of the term *kata symbebēkos*, see *ibid.* note 2.

another way, while his opponent tries to invalidate the reason or excuse offered); (4) *metalēpsis* – the two claims refer to the dispute rather than the act committed (one of the parties claims that the dispute could not legitimately take place, while the other party affirms that it can).

As a counterpart of these *staseis* or *zētēmata logika*, Hermagoras added four issues called *zētēmata nomika*.⁴⁷⁵ These latter focused on debates arising from the interpretation of texts rather than the adjudication of an unlawful act: (1) *rhēton kai hypexairesis*⁴⁷⁶ – the actual wording of a normative text is contrasted to the alleged intent of the person(s) drafting it; (2) *antinomia* – both parties refer to different texts, which contradict one another; (3) *amphibolia* – the text contains some ambiguity and the two parties interpret it in different ways; (4) *sylogismos* – one of the parties argues that there is a gap in the text and therefore the case has to be decided on the basis of other texts (by way of analogy).⁴⁷⁷

1.1 The Distinction between Facts and Qualities

Turning to the *Rhetoric*, a *prima facie* parallel to the issues is the distinction between questions of fact and questions of quality, which appears in several passages of the *Rhetoric*. Two of these show a strong similarity. In Book I, Chapter 1, there is the often quoted separation of argumentative roles, where Aristotle

⁴⁷⁵ Heath (1994a) 116, note 8, explains that by pointing out that *nomika zētēmata* refer to a text, whereas Hermagoras' definition of *stasis* says that it is a 'φάσις, καθ' ἣν ἀντιλαμβάνομεθα τοῦ ὑποκειμένου πράγματος, ἐν ᾧ ἐστὶ τὸ ζήτημα, καθ' ὃ ἐστὶν ἡ ἀμφισβήτησις' (*Prolegomenon Sylloge* 22, p. 329.10–12 Rabe = fr. 10b Matthes), i.e. the latter deals with the *pragma*, while 'νομικὰ ζητήματα are περὶ ῥητοῦ (cf. e.g. Hermogenes 37.17–20), and so do not grasp the ὑποκείμενον πρᾶγμα'. Woerther gives the fragment to Hermagoras the Younger (= fr. 2 Woerther), but remarks that the first half of the definition corresponds to what Quintilian attributes to Hermagoras (Quint. *Inst.* 3.6.1 = T 24 Woerther): Woerther (2012) 180–181 *ad loc.*

⁴⁷⁶ The name *rhēton kai dianoia* is more common. For Hermagoras' usage see Quint. *Inst.* 3.6.61 = T 41 (Woerther): 'scripti et voluntatis (quam ipse vocat κατὰ ῥητὸν καὶ ὑπεξαίρεσιν, id est dictum et exceptionem: quorum primus ei cum omnibus commune est, exceptionis nomen minus usitatum)'.

⁴⁷⁷ See, however, ch. III, sect. 5.3.1 above, with n. 347.

writes that

it is clear that the opponents have no function except to show that something is or is not true or has happened or has not happened; whether it is important or trivial or just or unjust, in so far as the lawmaker has not provided a definition, the judge should somehow decide himself and not learn from the opponents. (1354a 26–30)

In terms of *stasis* theory, the distinction here is between *stochasmos*⁴⁷⁸ on the one hand, and *poiotes* and *poson* on the other.⁴⁷⁹ It is clear, however, that Aristotle is not speaking of issues as a tool of the orator here, but, as I take it, about the necessity of proving one's claims (δεῖξαι τὸ πρᾶγμα) (for which, to be sure, identifying the question is the first step).

In chapter 15, discussing the types of witnesses among the kinds of non-technical proof, Aristotle makes a similar distinction:

[Recent witnesses who share the risk of being accused of perjury] are only witnesses of whether or not something has happened (whether something is or is not the case) but not witnesses of the quality of the act – of whether, for example, it was just or unjust or conferred an advantage or not. On such matters, outsiders are witnesses, and ancient ones the most credible; for they are incorruptible. (1376a 13–17)

In what follows, one finds further distinctions in terms of testimonies:

'Some witnesses are about the speaker, others about the opponent, and some about the facts, others about character' (23–25). While the distinction here is made, again, between facts and something else, testimonies related to character may be used to establish probability concerning the action under discussion, thus corresponding to an aspect of *stochasmos*.⁴⁸⁰

These occurrences of distinctions reminiscent of *staseis* are accidental⁴⁸¹ in the sense that they are not meant to explain the difference between the questions

⁴⁷⁸ Perhaps including definition, as I suggested above in ch. II, sect. 1.

⁴⁷⁹ The 'traditional' interpretation of the passage (cf. above ch. II, sect. 1) would then imply that Aristotle limits the use of *staseis* by the orator to *stochasmos*, and a complete system of issues could only serve as an analytic tool for determining the question to be decided rather than one of finding arguments.

⁴⁸⁰ Cf. n. 305 above. On the other hand, they may be used *exō tou pragmatos*, to provoke sympathy or anger in the audience.

⁴⁸¹ This term is used by Braet (1999) 410, 413.

themselves or what they are about. Aristotle's brief mentions refer to a distinction that should need no detailed explanation: in this sense, they may be taken to attest the existence of some kind of a theory of issues on the one hand, and Aristotle's knowledge of such practical distinctions used by the orators on the other.⁴⁸² Finally, it should be noted that these distinctions remain within the confines of judicial rhetoric, although the wording of the passage on witnesses shows that qualities other than justice/injustice can occur in a speech.

1.2 Common and Specific Questions of the Three Branches of Rhetoric

A different kind of distinction between questions is made in Book 1, Chapter 3, where Aristotle defines the three branches of rhetoric according to their respective audiences, to which their 'ends' (*telē*) refer (1358a 36–b 2). The *telos* determines the 'final' question on which the decision of the audience will be made, and, therefore, in terms of which persuasion is needed. A deliberative speech is meant to persuade that something is useful or harmful (according to whether it is a protreptic or an apotreptic speech); a judicial speaker (who may accuse or defend) needs to persuade about the just or unjust character of an action; and epideictic speakers (whose task is to praise or blame) look at whether something is honourable or shameful (20–29).

Aristotle explains that the *telē* determine central questions of the respective branches, while those of the other branches may or may not be raised by the speaker.⁴⁸³ He also gives examples of what is essential to discuss for each branch:

⁴⁸² See sect. 2 below.

⁴⁸³ 1358b 20–29: τέλος [...] τῷ μὲν συμβουλευόντι τὸ συμφέρον καὶ βλαβερόν [...] τὰ δ' ἄλλα πρὸς τοῦτο συμπαραλαμβάνει, ἢ δίκαιον ἢ ἄδικον, ἢ καλὸν ἢ αἰσχρόν· τοῖς δὲ δικάζομένοις τὸ δίκαιον καὶ τὸ ἄδικον, τὰ δ' ἄλλα καὶ οὗτοι συμπαραλαμβάνουσι πρὸς ταῦτα· τοῖς δ' ἐπαινοῦσιν καὶ ψέγουσιν τὸ καλὸν καὶ τὸ αἰσχρόν, τὰ δ' ἄλλα καὶ οὗτοι πρὸς ταῦτα ἐπαναφέρουσιν.

Here is a sign that the end of each is what has been said: sometimes one would not dispute other factors; for example, a judicial speaker that he has done something or done harm, but he would never agree that he has committed injustice; for [if he admitted that] there would be no need of a trial. (1358b 29–33)

He then concludes by drawing the practical conclusion that ‘it is first of all necessary to have propositions (προτάσεις) on these matters’ (1359a 6–7).

Two further questions are closely linked to the *tele*, but are common to the three branches of rhetoric. It is also necessary, Aristotle adds, to be prepared to address the question of facts: ‘since impossibilities cannot be done, nor have been done, but [only] possibilities, it is necessary for the deliberative, judicial, and epideictic speaker to have propositions about the possible and the impossible and whether something has happened or not and whether it will or will not come to be’ (11–16). Moreover, speakers ‘not only try to show what has been mentioned but that the good or the evil or the honourable or the shameful or the just or the unjust is great or small, either speaking of things in themselves or in comparison to each other’ (18–22), which makes it necessary to have propositions on these questions as well.

Here, we see that questions are raised at a level different from that of the distinction between facts and qualities in legal cases. On the one hand, the three *telē* point to questions that are necessarily raised in a specific type of speech, thus serving the aim of classification in the theory of rhetoric. On the other hand, the questions of possibility/facts and magnitude appear as common to all branches.

There also seems to be a certain logical order in these questions. While Aristotle mentions the *telē* first and only then the *koina*, which is apparently motivated by the context (i.e. that he started by stating that there are three *eidē* of rhetoric), he also makes it clear that the question of possibility/facts has to come first. If it is argued that something is (was, will be) the case or is possible, then the

question determined by the *telos* can be raised, with the problem of magnitude/importance in the third place of the discussion.⁴⁸⁴

This logical order makes it easy for these questions identified by Aristotle to be regarded as *staseis*, following the order of *stochasmos* – *poiotēs* – *poson*, which differs from Hermagoras' system to some extent, but nevertheless reconstructs the argumentative steps of a speech.

In his 1999 article, Antoine Braet argues that Aristotle's treatment of the *staseis* in Book 1 differs fundamentally from that of Book 3, and should be regarded as a completely different variant of *staseis*. In Book 1, chapter 3, the *staseis* are based on a thorough analysis, which shows that 'they form an exhaustive series'.⁴⁸⁵ Even more importantly, it becomes clear that there is an essential difference between what Braet calls *telē-staseis* and *koina-staseis*: while the latter need not be raised in every situation, the former can by no means be 'dropped'.⁴⁸⁶ Thirdly, while *staseis* in Book 3 have a *selective* as well as an *organisational* function, in Book I they contribute to *classifying* the means of persuasion. In particular, '[t]he author's purpose in mentioning the *staseis* in 1.3 is—from 1.4 on—to be able to list the material topics related to the *telē* and *koina*'.⁴⁸⁷ The approach reflected in Book 1, Braet argues, is both deeper and broader than that of Book 3, and seems more original as well, but has not been followed by later authors.

While Braet is certainly right in claiming that Aristotle gives a well-founded

⁴⁸⁴ While the question of magnitude can certainly be applied for each branch of rhetoric, it does not seem necessary for the speaker to raise (unlike possibility/facts, which are always, if only tacitly, present in each case). It should be admitted, however, that Aristotle only writes that 'all speakers try to show' the importance/magnitude they are focusing on, which may be somewhat exaggerated but nevertheless seems to reflect the actual practice of Athenian oratory.

⁴⁸⁵ Braet (1999) 417.

⁴⁸⁶ Braet (1999) 411–412 and 417 therefore calls these 'inescapable burden of proof', cf. also Harpine (1977).

⁴⁸⁷ Braet (1999) 420.

description of the *koina* and *telē*, as well as regards the classifying function of these questions, the question of whether a certain ‘*telos-stasis*’ can or cannot be dropped indicates a problem in terms of the interpretation of the *tele*.

The *telē*, as described by Aristotle, determine the character of a speech by pointing to the task of the orator in terms of persuasion. If the speaker has to accuse or defend someone in court, then the ‘final’ question is that of justice/injustice, and the speech belongs to the judicial branch. For each *telos* and thus for each branch, as we have seen, there is a ‘final’ question, and this question determines a *stasis* that, according to Braet, cannot be dropped (unlike those determined by the *koina*). This latter claim is, however, hard to defend in light of what Aristotle says about the question of possibility/fact, sc. that ‘impossibilities cannot be done, only possibilities etc.’. If someone is charged with a certain crime, but he can show that he cannot possibly have committed that specific action, then the question he focuses on is one of possibility/facts, the *stasis* of the speech is *stochasmos*, without even having to mention the questions belonging to the *stasis* of *poiotēs*. This, however, does not change the fact that the speech still belongs to the judicial genre, with justice/injustice as its *telos*. On the basis of the *telos*, then, the question can be formulated whether the person ‘committed an unjust action without justification’ (or, following Aristotle’s definition of wrongdoing, whether he ‘did wrong willingly and in contravention to the law’). Whether the defendant succeeds in showing that he did not commit the action, or that he was justified in doing so, in both cases the answer to the question will be negative. Yet this ‘final’ question is not that of a *stasis*, and Aristotle seems to be aware of the difference.

Thus, while Aristotle’s classification of speeches is not without any connection to the *staseis*, it is not identical with them either. What follows from that is that the speaker does not necessarily have to raise the question of *poiotēs*,

which directly refers to the *telos* of the respective branch. But that is true for each of the *staseis*, for this is what makes them *staseis*.⁴⁸⁸ In this sense, then, there is no difference between the *telē* and the *koina*, and *telē-staseis* (in the sense of *poiotēs*) are not in a privileged position in Aristotle's model of argumentation.

Before coming to the question of whether the model laid out in Book I of the *Rhetoric* is 'unco-ordinated' with that of Book III, it seems in order to have a look next at Aristotle's discussion of the arguments specific to judicial rhetoric from the perspective of *stasis* theory.

1.3 Issues in Judicial Argumentation

It is generally recognised that Aristotle's remark according to which 'people often admit having done an action and yet do not admit to the specific terms of an indictment or the crime with which it deals' (1373b 38–1374 a 2) anticipates the *stasis* of definition (*horos*),⁴⁸⁹ and reflects the realisation that a *stasis* may be dropped in order to focus on another.⁴⁹⁰ It is also noted that what follows the problem of *epigramma* is somehow related to the *stasis* of quality (*poiotēs*), although the two questions are not clearly distinguished.⁴⁹¹ Yet the question of whether and how these problems fit into the structure of Aristotle's discussion of judicial arguments has received little scholarly attention.

In the previous chapter I argued that Aristotle's treatment of these arguments in chapters 10–14 is governed by his definition of wrongdoing. In chapters 10–12 topics related to motivation are discussed, which may serve as the

⁴⁸⁸ Although it seems unlikely that the question of magnitude (*poson*) is raised independently of either of the other questions.

⁴⁸⁹ See e.g. Grimaldi (1980) 294 *ad loc.*

⁴⁹⁰ See Braet (1999) 413.

⁴⁹¹ See Braet (1999) 413.

basis of arguments aimed at showing that the character or disposition of a given person makes it likely that he actually committed the crime with which he has been charged. In chapter 13, arguments related to the just or unjust character of actions are discussed: first the *epigramma*, which according to Aristotle refers to written law, then *epieikeia*, which is somehow related to unwritten law.

Looking at Aristotle's definition of wrongdoing, 'doing harm willingly in contravention to the law', we see that the material in chapters 10–12 focuses on 'doing harm', while chapter 13 on whether something was done 'in contravention to the law', with the mental element ('willingly') serving as the link between the two, and also indicating Aristotle's perspective. Thus, Aristotle has chosen the definition of wrongdoing as the organising principle of these chapters, putting the emphasis on the perpetrator's attitude. The question is, then, whether this well-defined perspective leaves any space for the internal logic of a system of *staseis*.

That the first group of arguments in chapters 10–12 focuses on the question of whether a certain person has done something seems to be confirmed by the wording of the transition to the question of legal definition: 'people often admit having done an action etc.'. This way, Aristotle identifies not only the question of *epigramma*, but also the one that is dropped, i.e., that of the facts. Interestingly, then, we apparently have here both *stochasmos* and *horos*, the latter being introduced here for the first time in the *Rhetoric*.

In the introductory chapter of Book I, in his remark on the roles of the speaker and the judge, Aristotle only mentions three questions: whether something is/was/will be the case, whether it was just, and whether it was important, and he does the same in chapter 15, when classifying witnesses. In these distinctions, the question of 'facts' seems to include that of legal definition. For the question before the court is not formulated in the abstract, 'whether X has done something

unlawful', but as it is also clear from the wording of 1374a 1–2, the indictment has to describe the charge in more or less exact legal terms. Thus, the charge, and consequently the question to be decided by the judges, will take the form of 'whether X has committed Y'.

In chapter 13, however, Aristotle is not concerned with what the litigants can (or should) do in the trial. Rather, he first says what 'people often do', which provides some kind of a practical justification for the separation of *stochasmos* and *horos*. As a next step, *horos* is put into the (specifically Aristotelian) context of the discussion. As Aristotle explains, the question of *horos* is, in a final analysis, about 'whether somebody is unjust and wicked or not unjust', which is further reinforced by the references to the perpetrator's attitude.

The close affinity between *epigramma* and *epieikeia* is made explicit, once again, by the transition at 1374a 19–20: the former belonging to written, the latter to unwritten law, they are both subordinate to the question of whether the action took place 'in contravention to the law'. Also the example Aristotle gives for *epieikeia* as a way of interpretation shows the intimate link between the two, as it focuses on the problem of an insufficiently detailed legal definition. The closing sentence of the example, 'according to the written law he is violating the law and does wrong, when in truth he has not done any harm and this is fair' (1374a 36–b 1), could be interpreted as saying that although the defendant did commit violent assault (*trōsai*), he did not commit injustice. Yet Aristotle's claim is actually a stronger one: the defendant did not commit violent assault, as the legislator cannot possibly have intended to apply the law to the case where someone strikes merely with an iron ring on his hand.

Thus, while the difference between a case of legal definition and one of *epieikeia* is made clear, the one being conceptually based on written, the other on

unwritten law,⁴⁹² Aristotle also wants here to highlight the common points of the two, i.e. that both make use of the topic of definition and focus on the question of intention.

While the relationship between *epieikeia* and some of the later *zētēmata nomika* will be discussed later, the sub-categories of the *stasis* of *poiotēs* needs to be examined here, for some of them are strikingly similar to certain Aristotelian topics of *epieikeia*.

In *stasis* theories, the main distinction within *poiotēs* is between *antilēpsis* and *antithesis*.⁴⁹³ The former refers to the claim that the act was not unjust, which may broadly correspond to a claim based on *epieikeia* as an interpretive method. The *antithesis* covers cases where further considerations are brought in by the speaker. Its sub-categories are *antistasis*, *antenklēma*, *syngnōmē*, and *metastasis*. The first one, *antistasis*, seeks to justify the act by pointing out that it was done to achieve something that is good. *Antenklēma* consists in accusing someone else of another unjust act, which provoked the act under discussion. *Syngnōmē* entails the admission of having committed something wrong, and asking for leniency either with reference to the lack of intention or simply by asking for pity. Finally, *metastasis* involves arguing the lack of responsibility by showing that either another person or a thing has made the defendant to act in the way he did.

It would be, of course, difficult to find an exact correspondence between Aristotle's topics and these sub-*staseis*. The interpretation of the sources about

⁴⁹² An argument concerning *epigramma* focuses on the wording of the charge: if someone is accused of 'sacrilege', he has to show that he only committed theft by explaining that (1) sacrilege means stealing something that belongs to the god and (2) that what he took from the temple did not belong to the god. In a case of *epieikeia*, the legal definition given by the written law is sufficiently clear as well as the fact that the act under discussion is covered by the wording of that definition: who has struck with an iron ring on his hand needs to show that his ring does not exhaust the definition of 'iron' intended (but put into writing) by the legislator.

⁴⁹³ Not mentioning here the division *pragmatikē/dikaiologikē/peri prosōpou/peri hairētōn kai pheuktōn*, cf. sect. 2.3 below.

stasis systems is sometimes rather controversial, partly because different authors make different distinctions,⁴⁹⁴ which makes it difficult to establish any clear correspondence even between these systems. More importantly, authors of *stasis* doctrines had the aim of clearly distinguishing between their categories,⁴⁹⁵ whereas it should not be forgotten that distinctions were not Aristotle's only aim (and that his distinctions sometimes just do not follow the same lines as those of later textbooks), but are accompanied by broader unifying categories, such as the *telē* of rhetoric or the definition of wrongdoing in the case of the judicial branch.

This notwithstanding, Aristotelian *syngnōmē*, with its distinction between *adikēmata*, *atychēmata* and *hamartēmata*, although most probably not identical with the *stasis* of the same name, covers part of these issues, as do the maxims 'to look not to the part but to the whole' or 'to be forgiving of human weaknesses'.

In the *Rhetoric*, judicial arguments related to the common topic of magnitude follow those of *epieikeia* seamlessly. Here again, Aristotle makes clear that these arguments refer to the seriousness of a wrongful action (*adikēma de meizon*, 1374b 24). Thus, the common topic is linked to the specific ones of judicial rhetoric in two ways. On the one hand, the sequence of the topics follows the outline given in chapter 3: possibility/facts—justice—magnitude/importance, while on the other hand, chapters 10–14 are all linked through the concept of wrongdoing. Thus, the structure follows the sequence of questions, and it also has a conceptual unity.

⁴⁹⁴ See e.g. Heath (2004) ch. 2.

⁴⁹⁵ Apparently in order to be able to point to one *stasis* per case and to determine the argumentative strategy accordingly. This notwithstanding, side questions related to the main issue may have their own issues, e.g. in the case of an eunuch found in bed with another man's wife, charged with adultery and killed by the man, the main *stasis* may be 'counterplea' (*antilepsis*) if the killer claims that his action was justified by the law on adultery, but there is the preliminary question of whether an eunuch can actually commit adultery, which is a question of 'definition' (*horos*). Cf. Heath (1994a) 114.

To sum up the observations concerning the presence of *staseis logikai* in Book I, it may be stated that the ‘*staseis*’ introduced in chapter 3 establish the structure of laying out the material beginning with chapter 4. Moreover, this structure is followed not only in the sense that Aristotle first gives the ‘material topics’ of the *telē*, then those of the *koina*, but also within the discussion of at least the specific topics of the judicial branch in chapters 10–14. There, the discussion is also shaped by the concept of wrongdoing, which, in turn, corresponds to the *telos* of judicial rhetoric. The questions related to wrongdoing are four, with *epigramma* appearing in chapter 13, reflecting partly contemporary rhetorical practice, and partly the aspects of the just/unjust character of actions.

1.4 The Role of Issues in the Arrangement of the Speech

In the last chapters of Book III, Aristotle discusses the arrangement of the speech (*taxis*), describing the functions of each of its parts, together with the topics applicable. References to ‘*staseis*’ occur in the chapters on the introduction (*prooimion*), the narrative (*diēgēsis*), and the proof (*pistis*).

The main function of an introduction, Aristotle writes, is ‘to make clear what is the “end” for which the speech [is being given]’ (1415a 22–23), i.e., ‘to set out the “headings” of the argument in order that the “body” [of the speech] may have a “head”’ (1415b 7–9). This seems to correspond to the task of identifying the main questions of the debate, but here it has the function of making the audience capable of following the argument (as well as making them accept that the main issue in the case is what the speaker says it is⁴⁹⁶).

There is another function of the *prooimion*, which is made necessary by the

⁴⁹⁶ Cf. n. 463 and accompanying text above.

moral weakness of the audience: to accommodate what Aristotle calls ‘remedies’ (*iatreumata*, 1415a 24). Part of these relate to the speaker and the opponent, while part of them relate to the audience and the subject.⁴⁹⁷ The former group of *iatreumata* serve to dispel or create *diabolē* (περὶ αὐτοῦ μὲν καὶ τοῦ ἀντιδίκου οἷά περ διαβολὴν λῦσαι καὶ ποιῆσαι, 28–29), while the latter are used to make the audience well-disposed and attentive (or the contrary) (τὰ δὲ πρὸς τὸν ἀκροατὴν ἔκ τε τοῦ εὖνουν ποιῆσαι καὶ ἐκ τοῦ ὀργίσαι, καὶ ἐνίοτε τὸ προσεκτικὸν ἢ τοῦναντίον, 34–36).⁴⁹⁸

Most of Chapter 15 is then devoted to the ways of meeting *diabolē* in judicial speeches. Such accusations may influence the decision of the judge by shedding negative light on the opposing speaker’s character as well as by serving as the basis of (unspoken) analogies. Aristotle mentions eleven ways the defendant can try to remove or to counterbalance the effects of *diabolē*, two means which are suitable for use by either of the parties, and one technique by which the accuser can strengthen the accusation.

One way of countering such ‘side-accusations’ is, Aristotle says, similar to how one has to deal with the main issue (*ta amphisbētoumena*) of the debate, i.e. by claiming that the allegation ‘is not true or [the alleged act] was not harmful or not to this person, or not so much as claimed or not unjust, or not very, or not dishonourable or that it is not important’ (1416a 6–9).

Of the other ways of arguing against *diabolē*, some are directly relevant for the question of justice, such as the claim that what happened brought about something good as well, or that the act was due to mistake/bad luck/necessity, or

⁴⁹⁷ 1414a 26–27: λέγεται δὲ ταῦτα ἔκ τε τοῦ λέγοντος καὶ τοῦ ἀκροατοῦ καὶ τοῦ πράγματος καὶ τοῦ ἐναντίου. As the subsequent explanation shows, the two kinds of *prooimia* link the speaker and the opponent on the one hand, and the audience and the issue on the other.

⁴⁹⁸ Cf. Aristotle’s remarks on earlier textbooks (1354b 19–20) and on the characteristics of the audience in legal debates (1354b 8–11, 31–1355a 1).

that the defendant's intention was not directed at doing harm. Others are directed at the person of the opponent or show that *diabolē* in general or the specific accusation in the given case is not reliable. It is also here that the argument of *res iudicata*, together with the claim that the case was brought before the wrong court, is first mentioned in the *Rhetoric*: these correspond to the later *stasis* of *metalēpsis*.⁴⁹⁹

What is more important, however, is the structure of Aristotle's list of the issues which can be discussed for the actual *amphisbētēsis*. The first one is that of the facts. It is followed by the three basic qualities, corresponding to the three *telē* of rhetoric, and for each of these, the common topic of magnitude or importance can be applied as well. This reflects, without doubt, the selective function of the issues observed by Braet, but on the other hand, it also corresponds to what Aristotle says in Book I: the common topic of facts is the basis of any argument pointed at the quality of an act,⁵⁰⁰ and the common topic of magnitude can be applied for any of the three basic qualities, i.e. useful/harmful, just/unjust, honourable/disgraceful.

The same issues are mentioned in the discussion of *diēgēsis*. In epideictic speeches, Aristotle says, one has to show 'either that the action took place, if it seems unbelievable, or that it was of a certain kind or importance or all these

⁴⁹⁹ 1416a 28–35: 'Another [topic is] if there has been a previous decision, as in Euripides' reply to Hygiainon in an *antidosia* trial when accused of impiety because he had written a line recommending perjury: "My tongue swore, but my mind was unsworn". He said [Hygiainon] acted against the law when he brought trials into the law courts that belonged in the Dionysiac contest; for he had given or would give an account of the words there if anyone wanted to bring a complaint.' See Carawan (2001), esp. 37 and 44–47 on the twofold character of *metalēpsis*. By arguing that the case has been already decided, the speaker seeks to prevent further litigation; by referring to procedural issues, he calls for litigation in a different setting. As Aristotle here speaks about *diabolē*, he does not have to distinguish between the two aspects and by using both the past and the future tenses (δεδωκέναι λόγον, ἢ δώσειν, 33–34) he keeps both possibilities open.

⁵⁰⁰ This is well illustrated by the example of 'the reply of Iphicrates to Nausicrates, for he admitted that he had done what the other claimed and that it caused harm but not that he had committed a crime' (1416a 10–12).

things’ (1416b 20–22). Similarly, the narration of a forensic speech has to convince the audience ‘that something has happened or that harm has been done or injustice, or that the facts are as important’ (1416b 36–1417a 2). The defendant, he adds, may be content with raising doubt in one of the issues, and therefore his narration can be shorter: ‘one should not waste time on what is agreed unless something contributes to the defence, for example, if [it is agreed that] something has been done but not that it was unjust’ (1417a 10–12).

Finally, at the beginning of the chapter devoted to proofs we find the straightforward statement that ‘four points may be open to dispute’. These four are, again, facts, harm, importance and lawfulness (1417b 22–26). In epideictic speeches, ‘there will be much amplification about what is good and advantageous’, with the issue of facts discussed ‘only if any are incredible or if someone else is held responsible’ (1417b 30–34). The issues of deliberative oratory are ‘whether the events predicted will occur or, if they do, whether the policy recommended is unjust or not advantageous or unimportant’ (1417b 34–36).

Focusing on judicial rhetoric, we may observe that the list of the four main issues or *amphisbētēseis* is constant – except for the place of justification and magnitude, which follow one another in different order in the two passages – and that only two of the three qualities, harm and justice appear in them. On the one hand, this latter may be explained with that praiseworthiness would seem ‘off the point’ in a legal debate. On the other hand, however, the question arises how ‘harm’ is related to the *telos* of the deliberative branch of rhetoric.

While in the case of epideictic and deliberative rhetoric, the issues of quality are juxtaposed in terms of reasoning,⁵⁰¹ the sequence of harm and justification

⁵⁰¹ Note the wording of the passages quoted above: 1416b 20ff: ἢ ὅτι ἔστι δεῖξαι, ἐὰν ἢ ἄπιστον, ἢ ὅτι ποιόν, ἢ ὅτι ποσόν, ἢ καὶ ἅπαντα, 1417b 31f: ἐν δὲ τοῖς ἐπιδεικτικοῖς τὸ πολὺ ὅτι καλὰ καὶ

seems to be of importance in legal argumentation. The fact that the question of ‘justness’ follows the question of ‘harm’ in all the above passages⁵⁰² suggests that it is the harmfulness of the act committed that makes justification necessary: once the defendant admitted that by committing a certain act he has harmed someone (*eblapsen*), he can only argue that the harm was not as great as the plaintiff claims (*ou tosonde*) or that the act was still somehow justified (*dikaiōs*).

This suggests that harm, which is otherwise related to the *telos* of deliberative rhetoric, plays a special role in judicial argumentation. Such a special role is clearly shown by the definition of wrongdoing at the beginning of Book I, Chapter 10, according to which it is ‘doing harm willingly, in contravention to the law’ (1368b 6–7, cf. 13).⁵⁰³

This, then, raises the question of whether ‘harm’ really appears in the scheme of legal argumentation of Book III as one of the qualities. It certainly does in one passage, at 1416a 12–14: ἡ ἀντικαταλλάττεσθαι ἀδικοῦντα, εἰ βλαβερὸν, ἀλλ’ οὖν καλόν, εἰ λυπηρόν, ἀλλ’ ὠφέλιμον, ἢ τι ἄλλο τοιοῦτον. Here, the qualities characteristic for each of the three branches of rhetoric are represented in a case that is clearly about wrongdoing. In the passages quoted above (1416b 36–1417a 2, 1417a 8–10, b 22–26), however, it is not quite clear whether it is closer to qualities

ὠφέλιμα ἢ αὐξήσις ἔστω, 34ff: ἐν δὲ τοῖς δημηγορικοῖς ἡ ὥς οὐκ ἔσται ἀμφισβητήσιεν ἂν τις, ἡ ὥς ἔσται μὲν <ποιοῦσιν> ἃ κελεύει, ἀλλ’ οὐ δίκαια ἡ οὐκ ὠφέλιμα ἡ οὐ τηλικαῦτα.

⁵⁰² 1416b 36–1417a 2: λέγειν ὅσα δηλώσει τὸ πρᾶγμα, ἢ ὅσα ποιήσει ὑπολαβεῖν γεγονέναι ἢ βεβλαφέναι ἢ ἡδικηκέναι, ἢ τηλικαῦτα ἢ λίκα βούλει, 1417a 8–10: αἱ γὰρ ἀμφισβητήσεις ἢ μὴ γεγονέναι ἢ μὴ βλαβερὸν εἶναι ἢ μὴ ἄδικον ἢ μὴ τηλικούτον, 1417b 22–26: εἰ ὅτι οὐ γέγονεν ἀμφισβητεῖται, ἐν τῇ κρίσει δεῖ τούτου μάλιστα τὴν ἀπόδειξιν φέρειν, εἰ δ’ ὅτι οὐκ ἔβλαψεν, τούτου, καὶ ὅτι οὐ τοσόνδε ἢ ὅτι δικαίως.

⁵⁰³ The conceptual element of harm also appears in the *EN*, see e.g. the same definition (ὅταν παρὰ τὸν νόμον βλάβη μὴ ἀντιβλάπτων ἐκὼν, ἀδικεῖ) at 1138a 8–9. Also the opposite, *to sympheron* appears e.g. in statements concerning the role of laws (στοχαζόμενοι ἡ τοῦ κοινῇ συμφέροντος πᾶσιν κτλ.) at 1129b 15, and justice (ἡ δικαιοσύνη [...] πρὸς ἕτερόν ἐστιν· ἄλλω γὰρ τὰ συμφέροντα πράττει) at 1130a 3–5. See also 1132a 4–6: πρὸς τοῦ βλάβους τὴν διαφορὰν μόνον βλέπει ὁ νόμος, καὶ χρῆται ὥς ἴσοις, εἰ δὲ μὲν ἀδικεῖ ὁ δ’ ἀδικεῖται, καὶ εἰ ἔβλαψεν ὁ δὲ βέβλαπται.

or to the question of facts,⁵⁰⁴ and Aristotle apparently does not want to identify it with either.⁵⁰⁵

The role(s) played by harm seems to go beyond the conceptual divide between the two branches, and provides further illustration of Aristotle's method of embedding concepts in different contexts.

There again, we find some difference between the approach of Book I and Book III. Yet I think the differences may be accounted for within a common framework (which would speak in favour of the unity of the *Rhetoric*), by pushing Braet's observations concerning the functions of the two main discussions somewhat further. The main message of the introduction is the importance of keeping the speech between the limits of rational persuasion. What persuasion has to be pointed at is then clarified by the distinction of the three branches of rhetoric with their respective *telē*. The essential unity of rhetoric is emphasised by introducing the topics common to all three branches. Thus, the issues appear in places where Aristotle confronts the earlier rhetorical tradition, doing so by re-interpreting its elements and fitting them into his own theoretical construction.

There is no indication that Aristotle knew any fully developed theory of issues from textbooks,⁵⁰⁶ but the practice of concentrating on well-defined issues is sufficiently attested by Athenian oratory.⁵⁰⁷ They were an element of the tradition

⁵⁰⁴ The use of adjectives vs. verbs does not help to settle the question (an adjective might suggest a quality, a verb perhaps facts), as it is completely balanced in these passages: βεβλαφέναι ἢ ἡδίκηκέναι (1417a 1–2); μὴ βλαβερὸν εἶναι ἢ μὴ ἄδικον (9); ὅτι οὐκ ἔβλαψεν [...] ἢ ὅτι δικαίως (1417b 25–26). Note that even the 'proper' quality of the judicial branch is referred to by a verb (ἡδίκηκέναι) in the first case.

⁵⁰⁵ Even within deliberative argumentation, the exclusively 'quality' character of *blaberon* is relativised to some extent at 1416a 7–8, where Aristotle suggests that the speaker should dispel *diabolē* in the same way as he would argue in terms of the 'real' questions: ὥς οὐ βλαβερὸν ἢ οὐ τοῦτο, ἢ ὥς οὐ τηλικούτον. The question of whether something is harmful for someone seems to bring it closer to facts/possibilities.

⁵⁰⁶ See also sect. 2.1 below.

⁵⁰⁷ Cf. Volkmann (1885) 48–49, Navarre (1900) 265–266, both with the example of Lys. 13, and Usher (1999) 61–62 with Lys. 12.34–40, also mentioning Lys. 13 and 29.

that had to be explained in Aristotelian terms. Book III, in turn, is devoted to the style and arrangement of speeches, and the issues make their appearance in passages on *taxis*. Here, the emphasis is on the presentation of arguments, and the issues are discussed within this context. As they were given an adequate analysis in Book I, there is no need to repeat this.⁵⁰⁸

The function ‘harm’ has among the issues of judicial rhetoric shows, on the other hand, that the separation of the three branches of rhetoric according to their *telē* is far from being absolute. While Aristotle discusses the possible points of contradiction for the respective branches separately, also highlighting the differences among the structures of different types of speeches, he does not fail to indicate the overlaps between them either.

1.5 *Nomika zētēmata*

Similarly to the *staseis*, also the later *zētēmata nomika* were presupposed to make an appearance in the *Rhetoric*, and Aristotle’s work was accordingly examined for their possible antecedents. Such issues are in fact mentioned in the *Rhetoric* at the end of Book I, among the specific topics of judicial rhetoric, under the heading of *pisteis atechnoi*, i.e. the proofs that do not have to be invented by the orator. Thus Dieter Matthes in his 1958 survey could write that ‘im Abschnitt über den νόμος bereits die Grundlagen der hermagoreischen ζητήματα νομικά – mit Ausnahme des συλλογισμός zu erkennen sind’.⁵⁰⁹

In Chapter 15 of Book I, Aristotle distinguishes five kinds of non-artistic proofs: ‘laws, witnesses, contracts, evidence [of slaves] taken under torture, oaths.’ (1375a 24–25) In each of these cases, he describes the topics suitable for arguing

⁵⁰⁸ Cf. Marx (1900) 249.

⁵⁰⁹ Matthes (1958) 183.

both in favour of and against the credibility and importance of the proof concerned. In the case of laws, the topics first described can be divided into four groups: (1) the opposition of law and justice and of written and unwritten law, (2) the contradiction between different laws (or internal contradiction within one single law), (3) the ambiguity of the legal text, and (4) the inadequacy of a law for the changed circumstances. These can be used by the orator arguing against the written law, should it be ‘contrary to the case.’ (1375a 27–28: *enantios tōi pragmati*) For the orator arguing in favour of the law, which is then ‘in accordance with the case’, Aristotle gives topics which aim at showing the necessity of applying the law enacted. This means that these latter do not address the questions of contradiction and ambiguity, nor whether a particular provision is outdated or not, but treat every attempt at departing from the allegedly evident interpretation of the text as ‘trying to be smarter than the doctor.’

We have already seen that the topics of justice and injustice, and in particular those of *epieikeia* are considered as containing some traces of the *zētēmata nomika*. Indeed, the notion that ‘[it is fair] to look not to the law but to the legislator and not to the word but to the intent of the legislator’ (1374b 11–13) is apparently based on the same idea as what is later called *rhēton kai dianoia*.⁵¹⁰ While the topic of the legislator’s intent can be apparently recognised in this passage, Matthes tried to interpret the reference of Chapter 15 to *gnōmē aristē* (1375a 29–31) as a further instance of the same topic.⁵¹¹ The topics listed by Aristotle definitely furnish arguments against an inconvenient law by attacking written law *tout court*, yet the only point where the intent underlying a text may

⁵¹⁰ Cf. Stroux (1949) 27, note 31. See also the collection of relevant passages from the orators and elsewhere in Triantaphyllopoulos (1985) 156–159, note 142.

⁵¹¹ See Matthes (1958) 183.

come into question here is the interpretation of the very expression *gnōmēi tēi aristēi*. We may then say that the *epieikeia* or unwritten-law argument is backed by an argument from definition, but this does not make *gnōmēi tēi aristēi* refer to the legislator's *gnōmē*. If we take a look at the corresponding argument for the opposite (1375b 16–18), we see that it is based on an alternative interpretation of the same phrase, making it clear that it is the judges' 'best consideration' what is dealt with. The definition of *gnōmē aristē* has to be based on the legislator's intent, similarly to what we have seen in the case of arguments from fairness. Therefore, it is an instance of arguing from the legislator's intent only insofar as the opponents refer to this intent (one of them explicitly) in explaining how an expression of a legal text should be understood.

References to the legislator's intent could rather be related to the last argument described by Aristotle against the law: 'if, on the one hand, the situation for which the law was established no longer prevails but the law still exists, one should try to make this clear and fight with this [argument] against the law' (1375b 13–15). Describing 'the situation for which the law was established' presupposes a reconstruction of the legislator's intent: the only difference from definition is that here it has to be contrasted with a specific situation (*ta pragmata*) rather than a characteristic of the act under discussion, and therefore it aims at the non-application of that law in general and not in a particular case only.

What is common in the arguments from contradiction, ambiguity and outdatedness is that they all start from the interpretation of the law referred to by the opposing party, rather than denying the validity of written law as such. This may explain why they are kept together by Hermagoras and those following him, although the emergence and subsequent development of the *zētēmata nomika* would deserve more thorough investigation.

Aristotle, however, does not make a separate group of these issues, as opposed to the ones which later appear as *staseis*. On the one hand, they are classified as the topics belonging to the *pisteis atechnoi*, but on the other hand, they follow definition and *epieikeia* rather closely, making another example of related topics, which are divided by theoretical classification but linked through their position in the discussion.

2 Possible Aristotelian Influences on Hermagoras' Doctrine of Issues

The idea that the *Rhetoric* contains some of the later issues in a primitive form is not an invention of modern scholarship. In his overview of earlier doctrines of *staseis*, Quintilian mentions several authors who discussed issues, and Aristotle is one of these. Quintilian summarises what he regards as the Aristotelian set of issues as follows: 'Aristoteles in rhetoricis an sit, quale, quantum et quam multum sit quaerendum putat' (3.6.49), adding that definition also appears at some point: 'Quodam tamen loco finitionis quoque vim intellegit, quo dicit quaedam sic defendi: "sustuli, sed non furtum feci", "percussi, sed non iniuriam feci"' (ibid.).⁵¹² He later mentions that traces of the later *metalēpsis*, too, are recognisable in the *Rhetoric*: 'Tralationem hic [sc. Hermagoras] primus omnium tradidit, quamquam semina eius quaedam citra nomen ipsum apud Aristotelen reperiuntur' (60).

Although it is usually pointed out that Quintilian may not have had direct access to the *Rhetoric*,⁵¹³ his account certainly raises interest for the question of whether Aristotle could have an influence on the development of doctrines of issues. Quintilian, to be sure, does not say anything about such an influence.

⁵¹² The second statement seems to summarise the example of the iron ring, the one Aristotle gives for *epieikeia*.

⁵¹³ See e.g. Adamietz (1966) 9–10, 134 *ad* 3.6.49, quoted by Braet (1999) 433, note 53. Similarly on the *Categories*: Adamietz (1966) 123 *ad* 3.6.23, with references to earlier scholarship.

Rather, he emphasises that Aristotle's categories do not explain the issues.⁵¹⁴

To be able to assess the possibility of an Aristotelian influence, one should first look at what the basis of such an approach may be, i.e. what is Aristotelian in the issues as described in the *Rhetoric*. Accordingly, in what follows I first examine the treatment of proto-issues in the *Rhetorica ad Alexandrum*, the only other surviving textbook from the 4th century BC. While such a comparison cannot be conclusive in the sense that all correspondences between the two works could be attributed to a common source and all differences to Aristotle's own contributions, they may show the limits within which one may speculate about influences. After that, I turn to the reconstructed system of Hermagoras, to see whether any elements of it may be properly labelled Aristotelian. The final section deals with the problematic interpretation of the sub-categories of quality.

2.1 Issues in the *Rhetorica ad Alexandrum*

In the *Rhetorica ad Alexandrum*,⁵¹⁵ the first thing to note is that while the issues known from later doctrines of *staseis* are confined to the domain of judicial rhetoric, each of the three branches⁵¹⁶ have their own 'lines of defence' in terms of

⁵¹⁴ The expression of his reservation (3.6.28: 'Quae ne praeterisse viderer, satis habui attingere. Ceterum his nec status satis ostendi nec omnis contineri locos credo, quod apparebit diligentius legentibus quae de utraque re dicam; erunt enim plura multo quam quae his elementis comprehenduntur') seems to refer to the whole philosophical approach surveyed in the preceding sections (23–27).

⁵¹⁵ English quotations follow the translation of Mirhady (2011), with occasional modifications. References to the Greek give the section and paragraph numbers of Fuhrmann's (1966) edition, together with the page and line numbers of Bekker (1831/1960).

⁵¹⁶ Anaximenes first mentions a threefold division of rhetoric, into demegoric, epideictic, and judicial γένη. The passage is thought to be interpolated in order to bring it closer to Aristotelian doctrine: see e.g. Mirhady (1994) 56–57. Anaximenes later distinguishes seven εἶδη (1.1, 1421b 2–4), six of which form pairs (προτρεπτικόν/ἀποτρεπτικόν, ἐγκωμιαστικόν/ψεκτικόν, κατηγορικόν/ἀπολογικόν) corresponding to the three branches. The seventh εἶδος, the investigative (ἐξεταστικόν) is aimed at examining (and refuting) an argument (5.1, 1427b 12–16), and is said to occur mostly together with another εἶδος (5.5, 1427b 30–32). On the relationship of Anaximenes to the doctrine of the three branches, see e.g. Mirhady (1994) 55–70; on the possible Platonic roots of *exetasis*, see Mirhady (2008).

argumentation.

In deliberative speeches, the party proposing something has to show either that the proposed course of action is ‘just, legal, advantageous, noble, pleasant, and easy to do’, or, if that cannot be shown, that it is possible on the one hand and necessary to do on the other (1.4, 1421b 23–27). The opponents have to show the contrary, with the only difference that the claim that something is impossible belongs to the first, stronger group of arguments, while showing that the proposed thing is difficult to do is a fallback, alongside with ‘not necessary’ (1.5, 1421b 27–30).

Even epideictic speeches have their set of issues. The speaker commending a person or a thing has to show that good things were either done directly by the person or came about through those things, or were initiated by him, or happened together with something, or happened for the sake of something, or would not have been achieved without something (3.2, 1426a 3–7). While these topics are not explicitly divided into groups, it is apparent that they are ordered according to their strength: showing that someone has done something good seems a more efficient way of praising someone than arguing that something good was initiated by him.⁵¹⁷

Coming to the judicial branch, Anaximenes first distinguishes between speeches of accusation that are directed at *ponēria* and those that are meant to show the opponent’s *abelteria* (4.2, 1426b 30–34). In the first case, the speaker has to show that the act under discussion was unjust, unlawful, or harmful for the multitude, while in the second case that it was harmful for the accused himself,

⁵¹⁷ On the interpretation of the passage cf. Chiron (2002) 131–132 *ad loc.* It is only the three last topics that are illustrated by examples (3.3–5, 1426a 9–17). Some of these are general claims concerning the connection between different facts and characteristics.

shameful, unpleasant, or impossible to succeed.⁵¹⁸

The second distinction is between crimes for which the penalty is defined by law, and those for which the judges have to decide about the punishment (4.3, 1426b 36–39). In the first case, the accusation has to focus on the facts, i.e. that the action took place and that it was done by the defendant (4.4, 1426b 39–1427a 1). The subsequent discussion, however, does not follow the distinction according to the decision about the punishment, but is arranged according to the strategy of the defendant (4.4–6, 1427a 1–12). If the judges have knowledge of what happened, then the unjust character of the act needs to be amplified, which can be done with reference to *ponēria* as opposed to chance.⁵¹⁹ The third possible argument is directed against the defendant’s (anticipated) plea for leniency (*syngnōmē*).

The argumentative choices available to the defendant make the scheme of judicial issues somewhat clearer. The three main ways of arguing are either to deny having committed the act altogether (4.7, 1427a 23–25), or to claim that ‘what was done was lawful, just, noble, and advantageous to the city’ (25–27). In the worst case, the speaker should argue either that what happened was due to *hamartēma* or *atychēma*,⁵²⁰ or, on the other hand, that it did not cause much harm (27–30).

The distinction between cases where the punishment is determined by law

⁵¹⁸ The association of *ponēria* and *abelteria* with *adikēma* and *hamartēma*, respectively, as suggested by Mirhady (2007b) 10 does not seem compelling. Although the categories may overlap, it seems more likely that Anaximenes takes ‘accusation’ to cover a broader area than in Aristotle, and applies the precepts also to cases where the debate is not about wrongdoing in a legal sense. If this interpretation is correct, then the following distinctions are applicable to the first case, i.e. that of *ponēria*.

⁵¹⁹ In the phrase ἐκὼν καὶ ἐκ προνοίας οὐ τῆς τυχοῦσης, ἀλλὰ μετὰ παρασκευῆς πλείστης ἡδίκησεν (4.4, 1427a 3–5), τῆς τυχοῦσης does not have to be identified with *tychē* but may just refer to the lack of previous deliberation.

⁵²⁰ The definitions given by Anaximenes are quite close to those of the *Rhetoric*. See 4.8–9, 1427a 30–36: ἀδικίαν δὲ καὶ ἀμάρτημα καὶ ἀτυχίαν ὥδε ὀρίσαι· τὸ μὲν ἐκ προνοίας κακόν τι ποιεῖν ἀδικίαν τίθει, καὶ φάθι δεῖν τιμωρίαν ἐπὶ τοῖς τοιούτοις τὴν μεγίστην λαμβάνειν· τὸ δὲ δι’ ἄγνοιαν βλαβερόν τι πράττειν ἀμαρτίαν εἶναι φατέον. τὸ δὲ μὴ δι’ ἑαυτόν, ἀλλὰ δι’ ἑτέρους τινὰς ἢ διὰ τύχην μὴδὲν ἐπιτελεῖν τῶν βουλευθέντων καλῶς ἀτυχίαν τίθει κτλ. For the advice that in a plea for *syngnōmē* one should depict the mistake or bad luck as something common with the audience (4.9, 1427a 37–40, also 1444a 10–11), cf. *Rhet.* 1374b 10–11.

and those where the judges have to decide about it seems relevant for the use of arguments focusing on *syngnōmē*, as there is more scope for such arguments in the latter sort of cases.

Also in the sections on arrangement (*taxis*), issues appear as argumentative choices between (weakening) lines of defence. In trying to dispel prejudices (*diabolē*) resulting from an earlier case, the speaker has to make a brief defence, either by claiming that the earlier judgement was unjust, or by appealing to pity because of the harm suffered from that judgement (29.12–13, 1437a 5–14).

Coming to the confirmation of one's claims (*bebaiōsis*), Anaximenes writes that choices among the available means of persuasion should be made according to the issues which the controversy is focused on: 'If the opponents contest the facts, the confirmation will be based on proofs. But if they admit them, it will be based on arguments about justice, advantage, and what follow from them' (36.17, 1442b 32–35). These choices are discussed further in the sequel, with an excursus on possible topics related to the application of law (36.22–25, 1443a 10–38). Finally, the case where the defendant seeks to obtain pardon (*syngnōmē*) is discussed. For the defendant, Anaximenes offers the same threefold choice between arguments focusing on facts, lawfulness and justice, or *syngnōmē* (36.35, 1444a 5–10).

In sum, Anaximenes seems quite consistent in offering, both when discussing invention in judicial cases and the arrangement of forensic speeches, three lines of defence for the defendant, and the corresponding ways of accusation: raising doubt in terms of the facts of the case, arguing that the act committed was lawful or just, and in case neither of the above is possible, pleas for a lenient application of law.

Comparing that to what we find in the *Rhetoric*, one may note the similarity

between Anaximenes' distinction between *nomima* and *dikaia* on the one hand,⁵²¹ and Aristotle's dichotomy of arguments related to written and unwritten law. This makes it probable that what Anaximenes regards as essentially one group of arguments covers the material used by the later *staseis* of definition and quality. *Syngnōmē*, in turn, will be merged into quality in Hermagorean doctrine.

As for *syngnōmē*, we also see that in the *Rhetorica ad Alexandrum* it comprises magnitude, which is regarded as a separate issue by Aristotle, as well as the question of knowledge and intent (i.e. the distinction between *adikia*, *hamartēma* and *atychēma*), which is mentioned in the *Rhetoric* in connection with *epieikeia*. It also has to be noted that in Anaximenes magnitude always refers to the harm done, while in Aristotle it is linked to the respective quality in general.⁵²²

At a more general level, the presence of issues in deliberative and epideictic speeches seems to be a common feature of the two textbooks. In the *Rhetorica ad Alexandrum*, however, these issues differ by *eidē*: in deliberative speeches, they are related to two groups of qualities,⁵²³ while those of epideictic rhetoric concern the different degrees of connection between a certain person, his actions, and various other circumstances.

In terms of the later *zētēmata nomika*, Anaximenes does not offer a rich material. Questions related to the use of laws in forensic argumentation⁵²⁴ are

⁵²¹ See 1.7–8, 1421b 35–1422a 4: δίκαιον μὲν οὖν ἐστὶ τὸ τῶν ἀπάντων ἢ τὸ τῶν πλείστων ἔθος ἄγραφον, διορίζον τὰ καλὰ καὶ τὰ αἰσχρά. τοῦτο δὲ ἐστὶ τὸ γονέας τιμᾶν καὶ φίλους εὖ ποιεῖν καὶ τοῖς εὐεργέταις χάριν ἀποδιδόναι· ταῦτα γὰρ καὶ τὰ τούτοις ὅμοια οὐ προστάττουσι τοῖς ἀνθρώποις οἱ γεγραμμένοι νόμοι ποιεῖν, ἀλλ' ἔθει ἀγράφῳ καὶ κοινῷ νόμῳ νομίζεται. τὰ μὲν οὖν δίκαια ταῦτά ἐστι, νόμος δὲ ἐστὶν ὁμολόγημα πόλεως κοινὸν διὰ γραμμάτων προστάττον, πῶς χρὴ πράττειν ἕκαστα.

⁵²² Thus, in the case of injustice, the magnitude of the harm done is but one aspect of the question: see 1374b 24–25 and 29–30.

⁵²³ Including possibility, which Aristotle connects to the facts at 1359a 11–16.

⁵²⁴ Anaximenes does not include laws in his list of 'additional proofs' (*epithetoi pisteis*, see 14.7–17.2, 1431b 7–1432b 7), which broadly correspond to Aristotle's non-technical proofs. On the differences between the two treatments see Mirhady (1991) 10–11, Carey (1996) note 3.

mentioned only briefly in the section on *bebaiōsis*, and it is only the ambiguity of the legal text that is clearly recognisable, with the legislator's intent and interpretation in general mentioned in a much looser way.⁵²⁵

Similarities between the *Rhetoric* and the *Rhetorica ad Alexandrum* in general have been interpreted in various ways.⁵²⁶ In terms of the issues, they seem to suggest that the authors follow a common source, most probably some kind of a textbook that did not survive.⁵²⁷ If such a doctrinal source did in fact exist, it may well have included something about the identification of the main issue of any given debate. As both Aristotle and Anaximenes discuss that point for each branch of rhetoric (with the exception of Anaximenes' *exetastikē*), it seems that the primitive concept of issues underlying their treatments was not limited to the domain of forensic oratory. Yet the two authors diverge as soon as they go into the details of these issues, except perhaps for having certain 'qualities' on all of their lists. The differences in these details suggest that it may be Anaximenes who is closer to a common source on this point, while Aristotle extends the validity of his legal argumentative scheme, composed of elements already present in some form in earlier doctrine, to all the three branches in order to offer a more comprehensive theory. On the assumption that Anaximenes preserves more of the original doctrine, it seems that 'possibility' had been part of the set of deliberative issues, and 'magnitude' perhaps occurred among the judicial ones. As for the latter, magnitude, Aristotle extends its scope beyond the question of harm even within the

⁵²⁵ See 36.24, 1443a 31–35 (ambiguity), 36.27, 1443b 8–10 (legislator's intent), 36.25, 1443a 29–37 (competing interpretations).

⁵²⁶ Beyond the attribution of the two works to the same author, the possibilities of a common source and an influence in one way or the other have been discussed in modern scholarship. See e.g. Mirhady (1991) and Carey (1996), mentioned above in n. 524, who agree that there was some kind of a common source. Chiron (2011) has recently formulated a hypothesis about mutual influences between the two authors during the composition of the works.

⁵²⁷ Solmsen (1941) 46 claims that the part on *taxis* should be considered as Isocratean and 'that the τέχνη from which he borrows was that of his friend Theodectes.' See also *ibid.* 177, note 85.

judicial branch, thus bringing it closer to the practice of orators.

The issue of legal definition, as we have seen, may be covered by Anaximenes' quality of *nomimos*, yet there is no explicit reference to the use of definitions. Aristotle does mention the necessity of using definitions when contesting the relevance of a specific legal provision to the given case, but at the same time he integrates that issue into his intention-centered conception of judicial argumentation. Interestingly, he introduces the topic with reference to the practice of litigants, which may explain why he describes it as a separate issue in chapter 13 but fails to distinguish it from either facts or qualities elsewhere.⁵²⁸

Appeals to *syngnōmē*, sometimes in the negative form described by Anaximenes for the accuser, do occur in Attic oratory,⁵²⁹ and we even find the threefold distinction of *adikēma*, *hamartēma*, and *atychēma*.⁵³⁰ Whether it first emerged in such a neat form in oratory, ready to be absorbed by doctrine, or was formulated by a rhetorician whose pupils then referred to it in their speeches is difficult to determine. Yet what is more important for us here is that while Anaximenes offers it as a last line of defence for the accused, alongside the claim that the action did not cause much harm, Aristotle finds no place for it in his general scheme of issues, and links it to the topics related to the ethical aspect of *epieikeia*.⁵³¹

The fourth Hermagorean issue, *metalepsis*, does not occur anywhere in the *Rhetorica ad Alexandrum*. Aristotle does mention it, but only once and without any comments, in the chapters on arrangement, as one of the arguments worth using in

⁵²⁸ If one focuses on intention, as Aristotle does in Chapter 13, then definition doubtless belongs to the question of quality. Other aspects of a legal definition, however, are covered by questions of fact.

⁵²⁹ See e.g. Hyp. *Against Philippiades* 7.

⁵³⁰ See e.g. D. 18.274, Din. 1.59–60.

⁵³¹ That is particularly interesting as the threefold distinction according to different attitudes fits perfectly with his approach to judicial rhetoric.

a legal debate. Thus, while this kind of argument was certainly present in Athenian forensic argumentation,⁵³² it may well be the case that Hermagoras was the first to describe it in his textbook as one of the main issues.⁵³³

Of the *zētēmata nomika*, which focus on the interpretation of a legal text, Aristotle anticipates more, and in a more elaborate form, than Anaximenes. Among the topics related to law as a non-technical proof, both the conflict of norms and the ambiguity of the text appear (the first one is completely absent from Anaximenes), while the opposition of written law and the legislator's intention is named among the topics related to *epieikeia* (with further allusions to it in the discussion of 'interpretive' *epieikeia*, as well as in the *Nicomachean Ethics*). Anaximenes only mentions the legislator's intention as a possible backing for an attack against an unfavourable law, but does not use it in connection with interpretation. The use of analogy by way of an extensive interpretation (the Hermagorean *sylogismos*) is not mentioned explicitly in either textbook. As I hope to have shown in the preceding chapter, such an interpretation is conceptually covered by Aristotle's understanding of *epieikeia*, but does not appear as a separate issue.

Thus, for Aristotle as well as for Anaximenes, one may assume some kind of a rhetorical doctrine that served as their source. Yet in terms of the issues, that doctrine may not have had much more than what can be found in the extant pieces of Attic oratory, i.e. the importance of identifying the core of the debate (also reflected in the requirement that speakers do not digress from the point), the distinction between facts and qualities, the question of magnitude, and appeals to

⁵³² It is usually thought to correspond to *paragraphē*, see e.g. Matthes 165–166, and more recently Carawan (2001) 17–18. Procedural questions may be brought up independently of a *paragraphē* as well, see e.g. Antiphon *On the Murder of Herodes* 8–10 (connected to a definition).

⁵³³ As Quintilian has it, see 3.6.60, quoted above at the beginning of this section.

syngnōmē. Whether or not any order or logical connection between the issues was established in earlier doctrine is unclear, but it seems obvious that speakers only admitted as much as they inevitably had to, and focused on their strongest argument or ‘line of defence’.

Definitions and procedural issues may or may not have been treated in earlier doctrine (although they doubtless occurred in oratory), but were certainly not identified as issues at the same level as facts and qualities. The same applies to the later *zētēmata nomika*: while such interpretive moves can be observed in the orators, they were apparently not grouped under a common heading, and it seems likely that only ambiguity and perhaps the legislator’s intent were mentioned as possible topics of arguments. Here, it seems probable that Aristotle elaborated these arguments on the basis of the study of courtroom practice on the one hand, and of fallacious arguments on the other.

Having summarised what Aristotle may have contributed to the understanding of issues, we may now turn to Hermagoras’ doctrine of *staseis*.

2.2 *Krinomenon*

Looking at Aristotle on the one hand and Hermagoras’ reconstructed system of issues on the other, we may identify where the latter is usually thought to have gone beyond the former in the field of issues.

On the one hand, Hermagoras’ fragments make it clear that determining the issue is the first step of the *inventio*, as it helps to identify the question on which the speakers have to focus in their argumentation.⁵³⁴ Accordingly, he is generally

⁵³⁴ See e.g. Matthes (1958) 133, Braet (1999) 426.

assumed to have organised the topics according to the issues.⁵³⁵ In earlier literature, Solmsen argued that this was an important departure from Aristotelian tradition, which concentrated on the tasks of the orator.⁵³⁶ Braet, however, has convincingly shown that Aristotle's distinctions in Book I, Chapter 3 between the main *amphisbētēseis* serve to structure the topics treated in Books I and II. Following this direction, in the previous section I tried to show that the different types of *amphisbētēsis* actually structure the presentation of judicial topics in Chapters 10–14 as well, although Aristotle does not give sequences of topics in the way Hermagoras may have done.

There is, on the other hand, another aspect of the theory of issues which seems clearly post-Aristotelian. Hermagoras provides advice to the speakers about how to identify the issue in the form of what is commonly referred to as the doctrine of *krinomenon*.⁵³⁷ On the basis of Quintilian's testimony, the procedure of determining the issue is the following. The accuser's first proposition (*kataphasis*) is countered by the proposition of the defendant (*apophasis*). From the conflict of the two propositions a question emerges, which has to be decided upon by the judge (*krinomenon*).⁵³⁸ This can be illustrated by a schematic dialogue, as is done e.g. in the form 'You did it' – 'I did not do it' – 'Did he do it?'. Issues other than

⁵³⁵ See e.g. Matthes (1958) 114, Braet (1999) 425–426.

⁵³⁶ Solmsen (1941) 46–47. See, however, Braet (1999) 426–427.

⁵³⁷ Cf. Heath (2004) 8. See Calboli Montefusco (1972), and Heath (1994a) on the changes in that part of the doctrine between Hermagoras and Hermogenes.

⁵³⁸ Quint. *Inst.* 3.11.1–11, esp. 10–11: 'Causa facti non in omnis controversias cadit; nam quae fuerit causa faciendi ubi factum negatur? At ubi causa tractetur, negant eodem loco esse iudicationem quo quaestionem, idque et in rhetoricis Cicero et in Partitionibus dicit. Nam in coniectura est quaestio ex illo: factum, non factum, an factum sit. Ibi ergo iudicatio ubi quaestio, quia in eadem re prima quaestio et extrema disceptatio. At in qualitate: matrem Orestes occidit recte, non recte, an recte occiderit quaestio, nec statim iudicatio. Quando ergo? "Illa patrem meum occiderat." "Sed non ideo tu matrem debuisti occidere." An debuerit: hic iudicatio.' Another source of the reconstruction, the pseudo-Augustinian *De Rhetorica* offers a different scheme (144.30–145.6 Halm). While the latter is accepted as Hermagorean e.g. by Matthes (1958) 174–176, the arguments of Heath (1994a) 119–121 in favour of Quintilian's explanation seem convincing.

conjecture need an extended examination.⁵³⁹

According to Hermagoras, the *stasis* can be identified with the *apophasis*, i.e. the answer given by the defendant to the charges.⁵⁴⁰ While this doctrine underwent many changes after Hermagoras, it was a constant part of *stasis* doctrines up to the 2nd century BC, when it was abandoned in the new systems of Zeno and Hermogenes.⁵⁴¹

Aristotle does not consider the problem of determining the issue in Book I. In fact, he is not looking at the dispute consistently, from one privileged perspective, but shifts the perspective of discussion quite freely. In the first chapter, he contrasts the task of the litigants with that of the judge in the form of contradictory statements that make for polar questions (ὅτι ἔστιν ἢ οὐκ ἔστιν, ἢ γέγονεν ἢ οὐ γέγονεν· εἰ δὲ μέγα ἢ μικρόν, ἢ δίκαιον ἢ ἄδικον, 1354a 28–29) showing what needs to be proven on the one hand and decided on the other. In Chapter 3, the focus is on the pair of speakers, whose *amphisbētēsis* points towards the *telos* of the speech,⁵⁴² whereas the explanation he gives for judicial rhetoric is formulated from the perspective of the defendant.⁵⁴³ In Chapter 10, he starts with a definition of wrongdoing, which may be regarded as the basis of a question for the judge, corresponding to the *telos* of judicial rhetoric. He then goes on to the topics related to the perpetrator's attitude, with the advice that 'the prosecutor should consider, as they apply to the opponent, the number and nature of things that all desire when they do wrong to their neighbours, and the defendant should consider

⁵³⁹ See e.g. Heath (1994a) 117–121.

⁵⁴⁰ Cf. Heath (1994a) 121.

⁵⁴¹ Heath (1994a) 127–128.

⁵⁴² Here, Aristotle's formulation seems to suggest that the question is given in advance and the speakers' arguments have to be directed at it.

⁵⁴³ 1358b 30–32: περὶ μὲν γὰρ τῶν ἄλλων ἐνίοτε οὐκ ἂν ἀμφισβητήσαιεν, οἷον ὁ δικάζόμενος ὡς οὐ γέγονεν ἢ οὐκ ἔβλαψεν· ὅτι δ' ἄδικεῖ οὐδέποτε ἂν ὁμολογήσειεν κτλ.

what and how many of these do not apply' (1368b 29–32), where the focus is on the conflict between two propositions. In Chapter 13, after the classification of just and unjust actions, Aristotle returns to the topics with an observation on the practice of legal argumentation in favour of the defendant. While the task of the orators that follows from the argumentative strategy and the corresponding questions are formulated in a balanced way, the examples are all from the perspective of the defence. Similarly, the discussion of *epieikeia* is formulated in neutral terms, whereas the example of striking with an iron ring on one's hand is seen from the defendant's point of view. The perspective is less clear in the case of the topics related to virtue-*epieikeia*: the introductory section is, again, balanced, while the subsequent instances of *epieikeia* may have a slight slant towards the defendant, although it is not mentioned which party they support. The topics related in Chapter 14 are, in turn, directed at the magnitude of wrongdoing, and although neither party is mentioned here, either, they make the impression of being looked at with the prosecutor's eye.

In the sections on *taxis* in Book III, when discussing the ways of meeting prejudice (*diabolē*), the perspective is for the most part that of the defendant (although at the end of the list two topics for the prosecutor and a common one are mentioned as well). In terms of narrative, where one of the important virtues is that of economy (1416b 33–1417a 3), advice is given to both parties on how to select their point of proof, yet the main point of the issue is determined by the defendant's answer to the prosecutor's allegations. The section on proof begins, again, with the underlining of the importance of knowing what the *amphisbētēsis* is about. As the question here refers to what has to be supported by proof, the

discussion assumes that the parties have already made their first statements.⁵⁴⁴

In the *Rhetorica ad Alexandrum*, we find the same twofold approach in an even clearer form. In Sections 1 to 4, the emphasis is on the distinction between the issues, and it is highlighted that they represent (weakening) lines of defence.⁵⁴⁵ (This approach will appear once again in the section on *diabolē*, 29.13, 1437a 10–12, where two possible ways of dispelling prejudice due to an earlier judgement are described.) Interestingly, while the statements of the defendant follow those of the accuser in the order of presentation, the issues from the prosecutor's perspective are, with the exception of facts, inevitably formulated with reference to the defendant's (anticipated) answer to the charges.⁵⁴⁶

In sum, we see that while there is no explicit formulation of the *krinomenon* doctrine in either textbook, their authors were aware of the need to tailor the argumentation to the issue of the case, and also that the issue can be determined through the examination of the two parties' competing claims. While the *Rhetorica ad Alexandrum* is consistent in inferring the main issue from the defendant's answer to the initial statement of the accuser, but does not formulate a distinct *krinomenon*, Aristotle looks at the case from different points of view, while formulating the question emerging from the conflict of opening statements in certain passages.

2.3 Sub-Categories of Quality and Aristotle's Judicial Arguments

In the *De inventione*, his survey of earlier rhetorical doctrine written while a young

⁵⁴⁴ The same applies to deliberative and epideictic cases.

⁵⁴⁵ Cf. Braet (1999)

⁵⁴⁶ 4.5, 1427a 5–6: ἐὰν δὲ μὴ δυνατόν ᾖ τοῦτο ποιεῖν, ἀλλὰ νομίῃς δείξειν τὸν ἐναντίον, ὥς κτλ.

man,⁵⁴⁷ Cicero expresses his consternation over a distinctive feature of Hermagorean *stasis* theory. In his explanation of the content of the issue of quality (*constitutio generalis*), he notes that

huic generi Hermagoras partes quattuor subposuit, deliberativam, demonstrativam, iuridicalem, negotialem. quod eius, ut nos putamus, non mediocre peccatum reprehendendum videtur. [...] si deliberatio et demonstratio genera sunt causarum, non possunt recte partes alicuius generis causae putari; eadem enim res alii genus esse, alii pars potest, eidem genus esse et pars non potest. deliberatio autem et demonstratio genera sunt causarum. [...] Quodsi generis causae partes non possunt recte putari, multo minus recte partis causae partes putabuntur. (1.9.12–10.13)⁵⁴⁸

Moreover, as neither demonstration nor deliberation consist of the rejection of an accusation (*intentionis depulsio*), which is how Hermagoras defines issues, they have nothing to do with these: ‘placet autem ipsi constitutionem intentionis esse depulsionem; placeat igitur oportet demonstrationem et deliberationem non esse constitutionem nec partem constitutionis’ (1.10.13). The solution Cicero proposes is, accordingly, to keep just the two latter sub-categories of quality, *iuridicialis* and *negotialis*,⁵⁴⁹ with the further sub-divisions of the former.

While Cicero here certainly refers to the Aristotelian doctrine of the three *eide* of rhetoric, and criticises Hermagoras for ignoring it, it is far from obvious that Hermagoras actually made the mistake with which he is charged.⁵⁵⁰ As far as we may reconstruct his *technē*, it seems that Hermagoras did not use the distinction of the three branches as a *summa divisio*, but contrasted *theseis* and *hypothesesis*, indeterminate and determinate questions, within the domain of *politika zētēmata*,

⁵⁴⁷ Cf. *de orat.* 1.5: ‘pueris aut adolescentulis nobis’, which may mean something between 17 and 19 years, see Achard (1994) 6.

⁵⁴⁸ Quotations from the *De inventione* follow the text of Stroebel (1915).

⁵⁴⁹ For these, he gives the following descriptions: ‘iuridicialis est, in qua aequi et recti natura aut praemii aut poenae ratio quaeritur; negotialis, in qua, quid iuris ex civili more et aequitate sit, consideratur; cui diligentiae praeesse apud nos iure consulti existimantur’ (1.10.14). Cf. Quintilian’s criticism: ‘sunt enim velut regestae in hos commentarios quos adulescens deduxerat scholae, et si qua est in his culpa, tradentis est, sive eum movit quod Hermagoras prima in hoc loco posuit exempla ex quaestionibus iuris, sive quod Graeci pragmatikous vocant iuris interpretes. Sed Cicero quidem his pulcherrimos illos de Oratore substituit, ideoque culpari tamquam falsa praecipiat non potest’ (3.6.59–60).

⁵⁵⁰ See Matthes (1958) 149.

which he considered as the proper objects of rhetorical discourse.⁵⁵¹ This leaves open the possibility that Hermagoras subordinated deliberative and epideictic questions as well as those of justice to quality (in the way suggested by Aristotle's *symparalambanein* at 1358b 24–25 and 27, i.e. as additional considerations brought up in judicial or political speeches), without causing inconsistency in the system.⁵⁵²

The other authority who attests a fourfold division within the issue of quality is Quintilian. He, however, gives different names to two of the sub-categories. According to him, the sub-*staseis* were the following:

Hanc ita dividit: de adpetendis et fugiendis, quae est pars deliberativa; de persona (ea ostenditur laudativa); negotialem (πραγματικήν vocat), in qua de rebus ipsis quaeritur remoto personarum complexu, ut 'sitne liber qui est in adsertione', 'an divitiae superbiam pariant', 'an iustum quid, an bonum sit'; iuridicalem, in qua fere eadem, sed certis destinatisque personis quaerantur: 'an ille iuste hoc fecerit vel bene'. (3.6.56–57 = T 26 Woerther)

We see that Quintilian is quite confident in attributing the terms he uses to Hermagoras, while at the same time he seeks to signal the correspondences with those of Cicero.⁵⁵³ While the attribution of the fourfold division to Hermagoras has been challenged in earlier scholarship,⁵⁵⁴ there seems to be no compelling ground to reject it as unauthentic.⁵⁵⁵

While the exact content of the first two sub-*staseis* cannot be determined on the basis of such scarce evidence, it may not be very far from deliberative and epideictic topics, at least Quintilian felt justified to equate them.⁵⁵⁶ The use of such topics in legal argumentation is mentioned explicitly both in the *Rhetorica ad Alexandrum* and in Aristotle's *Rhetoric*. Yet in the *Rhetoric*, there seems to be a

⁵⁵¹ On *politika zētēmata*, see T 12–13 (Woerther). On *thesis* and *hypothesis*, see T 16–19 (Woerther).

⁵⁵² Cf. Matthes (1958) 149.

⁵⁵³ Cf. Matthes (1958) 149.

⁵⁵⁴ See e.g. Jaeneke (1904) 126ff., cf. Matthes (1958) 150.

⁵⁵⁵ Quintilian apparently had access to sources other than Cicero.

⁵⁵⁶ Matthes (1958) 150.

possible parallel within judicial argumentation, which shows a remarkable similarity to Quintilian's terms and may deserve mentioning here.

In Book I of the *Rhetoric*, we find topics corresponding to both *de adpetendis et fugiendis* and *de persona* in Chapters 10–12, within the domain of judicial rhetoric. There, Aristotle first enumerates topics concerning the possible motives of wrongdoing (1368b 28–1372a 3), also indicating that these include the question of *sympheron*, which is discussed among the deliberative topics (1369b 28–30), and then turns to the characteristics of people who are likely to commit certain kinds of wrongs. While these arguments may be used to show that a certain person is likely or unlikely to have committed a specific action, they can also work in argumentation where the focus is not on the facts of the case. If one accepts such an explanation of the first two sub-*staseis*, then it is not difficult to discover in Chapter 13 the material covered by *iuridicialis*, which focuses on the question of lawfulness and justice. Even the distinction between *absoluta* and *assumptiva* can be found in the topics of legal definition and 'interpretive' *epieikeia* on the one hand, and 'virtue' *epieikeia* on the other, with some of the further divisions among the topics related to the latter.

The fourth sub-*stasis* of quality, *negotialis*, cannot be accommodated within the threefold division of the *genera causarum*, and calls for a different explanation. Quintilian explicitly rejects the one put forth by Cicero,⁵⁵⁷ and proposes a different one, which links that sub-category to indeterminate questions, that is, to the *theseis*.⁵⁵⁸ If we assume that Quintilian preserves not only the Hermagorean names of the sub-*staseis* but also their sequence, and look accordingly for a parallel somewhere between Aristotle's arguments related to persons and those related to

⁵⁵⁷ See n. 549 above.

⁵⁵⁸ Cf. Matthes (1958) 150–151.

justice, then we see that in addition to what was promised in the introduction of Chapter 10, there appear some topics focusing on the kinds of wrongful acts.

Conclusion

In this chapter I examined some possible links between Aristotle's *Rhetoric* and Hellenistic *stasis* theories. The first half of the chapter focused on the appearance of issues in Books I and III of the *Rhetoric* and the function they have within Aristotle's conception of legal argumentation.

Concerning the conceptual separation of the three branches of rhetoric in Book I, Chapter 3, I argued that their respective *telē* cannot be regarded as issues in themselves, although the three aspects of the issue of quality do correspond to them. What follows from the distinction between the *telē* and the issues is that the we do not need to take, with Braet, the description of *amphisbētēseis* at 1358b 29–1359a 5 to formulate an 'inescapable burden of proof'. While e.g. the question of justice/injustice is characteristic of the judicial branch in the sense that, in the words of Aristotle, the parties of a trial cannot agree that the action committed was unjust, this does not mean that the proof necessarily has to be directed at the question of justice. In other words, the issue of a judicial speech is not necessarily that of quality. If this interpretation of the *telē* is correct, then we cannot see in Chapter 3 an 'attempt' to formulate an unorthodox doctrine of issues.

I also argued that in Chapters 10–14 of Book I the topics follow the order of facts–definition–quality–magnitude, which reflects the logical order described in Chapter 3. Moreover, the remark introducing the issue of definition (which does not seem to be recognised by Aristotle as a separate issue but rather as an aspect of quality) suggests that they can be taken as strategic choices among different lines

of defence, which tacitly anticipates a characteristic feature of later doctrines of issues.

In Book III, the lists of issues usually contain facts, harmfulness, justice, and magnitude. Here, the main question is how harmfulness fits into the scheme of legal argumentation. The reason for its appearance may be that here, too, the discussion is oriented by the structure of Aristotle's conception of wrongdoing, with the issues of facts and harmfulness being separated within the element of 'doing harm'. Unlike in Book I, however, the mental element does not play a privileged role, perhaps because the discussion focuses on arrangement rather than on justice and injustice.

Topics reminiscent of the later *zētēmata nomika* were briefly examined at the end of section 1. Of the four issues, two appear in Chapter 13, and two among the topics related to the use of non-technical proof in Chapter 15. While the latter, ambiguity and contradiction, are explicitly mentioned by Aristotle, of the other two only the contrast between the wording of the law and the intent of the legislator figures on the list of topics regarding *epieikeia* (in addition to its presence in the conceptual explanation of *epieikeia* as a principle of interpretation earlier in the chapter). *Syllogismos*, as I argued in the previous chapter, is perfectly compatible with the Aristotelian concept of *epieikeia* and the related methods of argumentation, but it is not mentioned as a separate instance.

In the second half of the chapter, I turned to the relationship between Aristotle and earlier rhetorical theory on the one hand, and the Hermagorean doctrine of issues on the other. I approached the former question through a comparison of the *Rhetoric* and the *Rhetorica ad Alexandrum*, which is generally acknowledged as representing the earlier (or at any rate non-Aristotelian) tradition of textbooks. Although Anaximenes' work is more consistent in its treatment of

issues, it also makes more limited use of them. The standard sequence of issues in judicial argumentation is facts–quality–*syngnōmē*, with magnitude appearing as a sub-category of the latter, together with the lack of foreknowledge or intent (*hamartēma/atychēma*). Quality is said to include lawfulness, justice, honourableness and usefulness, thus going beyond the limits of the judicial branch in the same way as Aristotle does.

If we assume the existence of a common source behind the *Rhetoric* and the *Rhetorica ad Alexandrum*, the question arises how far each of the two authors followed it. Limiting the common source to what is actually common in the two works, we are left with a rather basic conception of issues, and with much uncertainty in terms of the details. If, however, we assume that it is Anaximenes who keeps closer to the original version, then we may try to understand the modifications made by Aristotle. Anaximenes' distinction of *ennomon* and *dikaion* is replaced by the contrast between arguments about justice related to written law (definition) and those related to unwritten law (fairness). From the arguments aiming at *syngnōmē*, only magnitude remains among the issues, while the question of foreknowledge and intent are subordinated to fairness. For the first move, the reason may be Aristotle's conception of law, which cannot be separated from justice. In addition to that, the way he introduces the issue of definition seems to reflect the observation of the practice of legal argumentation in forensic oratory. Thus, by distinguishing between arguments about justice according to whether they are related to written and unwritten law, Aristotle brings his topics closer to both his philosophical views and to contemporary practice. As for his preference for magnitude, it may be explained with the closer relationship between fairness and the question of intent. While part of the arguments about magnitude are likewise related to the graveness of injustice, Aristotle also mentions that some of

them focus on the magnitude of the harm done, which he may have regarded as a reason for keeping these arguments separate from those of *syngnōmē*, while transposing the latter under the heading of fairness. Here, then, Aristotle seems to follow theoretical considerations rather than the tactical ones which seem to underlie the version given by Anaximenes.

Talking about possible Aristotelian influences on Hermagoras' doctrine of *staseis* means moving on to even less firm ground due to the virtual absence of sources from the nearly two centuries separating the two authors. Even the accessibility of the *Rhetoric* during that period seems less than certain. What can be still identified is those points of Hermagoras' (reconstructed) doctrine which seem to be closer to Aristotle than to the *Rhetorica ad Alexandrum*, and where some kind of an influence is at least not impossible.

In the final part of this chapter, I examined three such points of Hermagoras' theory. In the cases of definition (*horos*) and procedure (*metalepsis*), Anaximenes is silent, whereas Aristotle does mention them (and mentions them as issues), yet without integrating them in his lists of issues. I argued that these may have appeared in the *Rhetoric* as reflections of the forensic practice of legal argumentation rather than parts of the heritage of earlier textbooks, and might be sources of inspiration for Hermagoras even in the case he only had indirect knowledge of the *Rhetoric*.

Another possible connection is between Hermagoras' sub-*staseis* of quality and the groups of topics discussed in Chapters 10–13 of the *Rhetoric*. If we accept the information offered by Quintilian about the names of the sub-*staseis* (*de adpetendis et fugiendis*, *de persona*, *negotialis* [*pragmatikē*], and *iuridicalis*), they seem to adequately describe the content of Aristotle's topics. Such an interpretation, if correct, confirms the Aristotelian origin of (at least the names of)

the sub-*staseis*, as well as the plausible hypothesis that Cicero and Quintilian misunderstood (or had insufficient information about) that part of Hermagoras' system.

Conclusion

On the basis of the preceding chapters I shall now summarise the picture of Aristotle's legal rhetoric that emerges from his work, also in contrast with those of Plato. Rather than merely repeating the conclusions of the individual chapters, I am going to focus on the problems mentioned at the end of the Introduction.

1 Plato and Aristotle

Aristotle's *Rhetoric* is often regarded as an implementation of Platonic principles, in particular of those formulated in the *Phaedrus*, in the field of rhetoric. In chapter I, I reconstructed Plato's view of rhetoric on the basis of four dialogues, the *Gorgias*, the *Phaedrus*, the *Statesman*, and the *Laws*. I argued that Plato finds no place for 'ordinary' rhetoric in the sense of the contemporary theory and practice of persuasion through public speaking, nor does he want to leave it any space. The 'good rhetoric' alluded to in the *Gorgias* and described in more detail in the *Phaedrus* is not some kind of a reformed rhetoric, but a genuinely Socratic pursuit which is offered instead of rhetoric for those who devote themselves to philosophy. The problem of rhetoric is taken up again in the *Statesman*, where it seems to come closer to 'ordinary' rhetoric but is used by the wise ruler in service of the political community. This approach is then elaborated in the *Laws*, where both the use of rhetoric and those using it are described, as well as the ways in which rhetoric is made to disappear, at least from the world of legal practice, through legislation. In the nearly utopian city of Magnesia, access to the use of rhetoric is limited to the ruling elite, and its primary function in terms of law is to persuade the citizens to obey the rules, that is, to influence *their* decisions (rather than that of the judges)

before doing something (rather than after something has been done).

In chapter II, I argued that such an approach to rhetoric clearly differs from that of Aristotle. Even if we accept the view that the *Rhetoric* was meant to be read by Aristotle's pupils, it apparently discusses argumentation in an 'ordinary' setting, i.e. not confined to a certain group of citizens or a certain kind of persuasion. Given that Aristotle explicitly endorses the idea of requiring the litigants to keep to the point in their speeches (*Rhet.* 1354a 21–24) as well as limiting the space of judicial discretion through legislation (31–34), it is usually assumed that he also wants the laws to restrict the scope of legal argumentation by the litigants (26–31). A detailed analysis of the passage and its context shows, however, that the real contrast is not between arguing about facts and qualities, but between the use of proof and trying to persuade the judges through emotional manipulation or irrelevant arguments. Thus, there is no contradiction between the first chapter and the later chapters of Book I. More importantly for the relationship between Plato's and Aristotle's views of rhetoric, it shows how Aristotle is inspired by Plato on the one hand and how he departs from Plato's position on the other. Plato looks at rhetoric from a political perspective and seeks to find political solutions for the problems related to its uses and abuses. While he wants to replace rhetoric in some aspects and regulate its use in others, he does not try to come up with new principles for 'good rhetorical practice'. Whether he recommends it to be banned from the city or be exclusively in the hands of the wise rulers, he leaves ordinary rhetoric as it is, with all its sophistical features. Aristotle does follow the political approach to a certain extent, e.g. by commenting on regulations concerning forensic speeches, but the project of his *Rhetoric* is exactly that of making rhetoric better by shifting its focus towards rational persuasion based on proof.

The question of the relative values of judicial and deliberative rhetoric is

another area where the influence of Plato's approach seems to be tacitly assumed in scholarship. Such an assumption is by no means counter-intuitive and seems to be confirmed by passages where Aristotle criticises previous textbooks for their preoccupation with judicial rhetoric, as well as the contemporary practice of forensic oratory, or where he compares the two branches in clear terms. Yet as shown by an examination of the relevant passages of the *Rhetoric*, the relevance of these statements is limited to the actual practice of speakers (and their audience) on the one hand and the importance of the subjects treated in speeches belonging to the two branches on the other. Aristotle makes it clear that speaking about deliberative topics is 'nobler and more political', apparently because it is related to the common good of the *polis* (as opposed to those *peri ta synallagmata*), which also makes the audience more interested and therefore leaves less space for irrelevant arguments and other trickery. This value judgement does not, however, appear in the *summa divisio* of rhetoric, i.e. the distinction of branches (*eidē*) according to their ends (*telē*), nor in the discussion of the proofs or the style and arrangement of speeches. Thus, the difference in value seems to be limited to individual situations in the sense that a specific speech given before a court may be less important for the political community than one in the assembly and that citizens acting as judges may pay less attention to their decision in a specific case than they would in the assembly. By stating that, Aristotle does not establish a hierarchy among the three branches of rhetoric, nor does he disapprove of *dikanikē pragmateia* in general. In that, his position clearly differs from that of Isocrates, who explicitly discourages his readers from dealing with judicial cases. Of course, if asked the theoretical question whether judicial rhetoric can be important in so far as it serves justice, Isocrates may have given a more nuanced answer. Yet in the absence of a *technē* written by him, we cannot know whether he contemplated such

questions at all. What we have from him is, at any rate, more in line with Plato's views in this respect than Aristotle's approach.

2 Theory and Practice

The second half of the thesis took a closer look at Aristotle's discussions of more technical matters, to see how he carries out the project outlined in the first half. Chapter III explored how far the discussion of the specific topics of judicial rhetoric in Book I, Chapters 10–15 is governed by Aristotle's definition of wrongdoing ('doing harm willingly in contravention to the law') given at the beginning of Chapter 10. I argued that the unity of Chapters 10–14 is due to the consistent focus on intention. While Chapters 10–12 contain topics related to the question of 'doing harm willingly', Chapter 13 discusses two aspects of 'in contravention to the law', both of them in connection with the element of intent. Even in Chapter 14, which is devoted to the question of magnitude, the focus is on the degree of injustice, approached through the circumstances of the action, with the degree of harm just mentioned in passing.

Throughout these chapters, then, Aristotle's perspective is determined by the question of intention, which points to the link between his rhetorical precepts and his doctrines of moral philosophy on the one hand, and his knowledge of the practice of legal argumentation on the other. For Aristotle, the conceptual border between rhetoric and other *technai*, including philosophy, is clear. Distinctions made in rhetorical argumentation do not have to reach the sharpness of those made by subject-specific disciplines. Nevertheless, his discussion of judicial topics is at certain points clearly informed by his moral philosophy. One of these may be his description of *epieikeia*, which first focuses on the relationship between fairness

and the interpretation of law, then gives a list of topics related to *epieikeia* as a virtue. In the first phase, the discussion is pointed at the means and function of fairness, the latter essentially agreeing with what Aristotle says in Book V, Chapter 10 of the *Nicomachean Ethics*. The list of topics, in turn, is based on popular notions of what counts as *epieikes*, which can be used, directly or indirectly, as the basis of arguments in judicial speeches. Thus, in the *Rhetoric* we can see both Aristotle's efforts at systematising and theoretically explaining topics of legal argumentation and the 'raw' form of these topics. Together, they highlight the most 'Aristotelian' aspect of the *Rhetoric*: working with material collected from everyday experience, and working with it in a theoretically sophisticated way.

Since recent research has shown for several judicial topics described by Aristotle that they also occur in earlier and contemporary Attic oratory, and it is also acknowledged that Aristotle's ethical works seek to clarify and explain commonly held moral views, the question of whether and how parts of Aristotle's ethical doctrine are based on his knowledge of forensic oratory seems worthy of further investigation. Such research is apparently at odds with the view that Aristotle was not interested in judicial speeches, and may eventually furnish evidence to the contrary.

Examining possible links between the *Rhetoric* and Hellenistic *stasis* theory, chapter IV provided similar insights concerning Aristotle's way of working with rhetorical material collected from earlier theory and contemporary practice. Parallels with the *Rhetorica ad Alexandrum* and with surviving judicial speeches suggest that Aristotle is rather close to both the theory and the practice he might know. The structure of his discussion clearly shows, however, that the question of argumentative strategy is, for him, subordinate to the aim of judicial oratory, that is, showing (by way of rational argumentation) that someone has or has not 'done

harm willingly in contravention to the law’.

3 Influences

The final part of chapter IV considered the possibility of Aristotelian influence on *stasis* theories. Aristotle, to start with, cannot be (and generally is not) regarded as the inventor of the concept of *stasis*. Firstly because, as mentioned above, in this field he works with theoretical and practical material collected from other authors, and secondly because he does not conceptualise *stasis* as a device of rhetorical invention, although he seems to be aware of the importance of identifying the main issue of any debate. I also argued that his discussion of the *telē* of the three branches of rhetoric should not be read as a conscious contribution to *stasis* theory.

A comparison with the relevant passages of the *Rhetorica ad Alexandrum* reveals those points where Aristotle discusses topics that correspond to *staseis* or sub-*staseis* of Hermagoras’ system but which are not mentioned by Anaximenes. These include the issues of definition (*horos*) and procedure (*metalēpsis*) as well as some of the *nomika zētēmata*. While Aristotle speaks of the former, definition and procedure, as argumentative choices, he does not include them in his lists of issues, which only contain facts/possibilities, qualities, and magnitude. In the case of procedural issues, the reason may be that these are not directly linked to wrongdoing and therefore not within the domain of judicial rhetoric strictly speaking, although they do occur in legal argumentation. Definition, in turn, is in Chapter 13 linked to the question of intent and the interpretation of law, and is therefore not separated from the discussion of *epieikeia* as an argumentative choice (although a conceptual distinction is made). Thus, while there is no conscious development of *stasis* theory here, either, it seems possible that Aristotle’s hints at

these topics, together with those similar to the *nomika zētēmata*, served as inspiration for later authors, even if only through an indirect tradition. The structure of Aristotle's discussion of judicial topics in Chapters 10–13 seems to correspond to the sub-categories of the Hermagorean *stasis* of quality (at least as Quintilian has their names), which may also suggest some kind of inspiration, albeit the scarcity of evidence makes it impossible to find further support for this identification.

The case of *stasis* theory thus seems to characterise in general Aristotle's approach to the rhetorical tradition as well as the ancient reception of the *Rhetoric*. Since Aristotle's work has a rather well-defined aim, material from theoretical works as well as practice is arranged according to its theoretical principles. These principles, in turn, are for the most part not followed in later works whose authors were to some extent inspired by Aristotle. Yet this is again a topic that certainly deserves a more thorough investigation than what is available today: a comprehensive survey of the Aristotelian tradition in later rhetoric remains to be written.

Bibliography

Abbreviations

AC = Antiquité classique

AJP = American Journal of Philology

ARWP = Archiv für Rechts- und Wirtschaftsphilosophie

BICS = Bulletin of the Institute of Classical Studies

CP = Classical Philology

CQ = Classical Quarterly

GRBS = Greek, Roman and Byzantine Studies

Harv. L. Rev. = Harvard Law Review

IJSL = International Journal for the Semiotics of Law

JFAA = Journal of the American Forensic Association

JHS = Journal of Hellenic Studies

JP = Journal of Philology

LICS = Leeds International Classical Studies

Loy. L. A. L. Rev. = Loyola of Los Angeles Law Review

PhR = Philosophical Review

P&R = Philosophy and Rhetoric

QJS = Quarterly Journal of Speech

REG = Revue des études grecques

RhM = Rheinisches Museum für Philologie

RHDFE = Revue historique de droit français et étranger

RIDA = Revue internationale des droits de l'antiquité, 3e Série

RPFE = Revue philosophique de la France et de l'étranger

RR = Rhetoric Review

RSQ = Rhetoric Society Quarterly

SDHI = Studia et Documenta Historiae et Iuris

SM = Speech Monographs

SSJ = Southern Speech Journal

Wash. U. L. Q. = Washington University Law Quarterly

Yale L. J. = Yale Law Journal

Works Cited

- Achard, G. (1994). *Cicéron, De l'invention*. Paris.
- Adamietz, J. (1966). *M. F. Quintiliani Institutionis oratoriae liber III*. München.
- Alchourrón, C. E. and Bulygin, E. (1971). *Normative Systems*. Wien.
- Anagnostopoulos, G., ed. (2009a). *A Companion to Aristotle*. Chichester.
- Anagnostopoulos, G. (2009b). 'Aristotle's Life,' in Anagnostopoulos (2009a): 3–13.
- Annas, J. and Rowe, C., eds. (2002). *New Perspectives on Plato, Modern and Ancient*. Washington, DC.
- Arnhart, L. (1981). *Aristotle on Political Reasoning: A Commentary on the "Rhetoric"*. DeKalb, IL.
- Asmis, E. (1992). 'Plato on Poetic Creativity,' in Kraut (1992): 338–364.
- Ausland, H. W. (2007). 'Socrates' Argument with Gorgias, the Craft Analogy, and Justice,' in Erler and Brisson (2007): 158–161.
- Balansard, A. (2001). *Technè dans les Dialogues de Platon: L'empreinte de la sophistique*. Sankt Augustin.
- Behr, C. A., ed. (1978). *P. Aelii Aristidis opera quae exstant omnia*, vol. 1.2. Leiden.
- Bekker, I. (1831/1960). *Aristotelis opera*, 5 vols. 2d ed. by O. Gigon. Berlin.
- Benardete, S. (1991). *The Rhetoric of Morality and Philosophy: Plato's Gorgias and Phaedrus*. Chicago, IL.
- Benoit, W. (1990). 'Isocrates and Aristotle on Rhetoric,' *RSQ* 20.3: 251–259.
- Berman, H. J. (1994). 'The Origins of Historical Jurisprudence: Coke, Selden, Hale,' *Yale L. J.* 103.7: 1651–1738.
- Black, E. (1958/1979). 'Plato's View of Rhetoric,' *QJS* 44.4: 361–374, repr. in Erickson (1979): 171–191.
- Blass, F. (1874). *Die attische Beredsamkeit*, vol. 2. Leipzig.
- Bobonich, C. (1991). 'Persuasion, Compulsion and Freedom in Plato's *Laws*,' *CQ* 41.2: 365–388.
- Bonitz, H. (1870). *Index Aristotelicus* (= *Aristotelis opera*, vol. 5). Berlin.
- Bonner, R. J. (1920a). 'The Legal Setting of Isocrates' *Antidosis*,' *CP* 15.2: 193–197.
- Bonner, R. J. (1920b). 'Note on Isocrates' *Panegyricus* 188,' *CP* 15.4: 385–387.
- Braet, A. C. (1984). *De klassieke statusleer in modern perspectief: Een historisch-systematische bijdrage tot de argumentatieleer*. Groningen.
- Braet, A. C. (1999). 'Aristotle's Almost Unnoticed Contribution to the Doctrine of Stasis,' *Mnemosyne* 52.4: 408–433.
- Brandwood, L. (1990). *The Chronology of Plato's Dialogues*. Cambridge.
- Broadie, S. and Rowe, C. J. (2002). *Aristotle, Nicomachean Ethics*. Oxford.

- Brunschwig, J. (1996). 'Rule and Exception: On the Aristotelian Theory of Equity,' in M. Frede and G. Striker, eds. *Rationality in Greek Thought*. Oxford: 115–155.
- Burnet, J. (1900–1907). *Platonis opera*, 5 vols. Oxford.
- Burns, T. (2011). *Aristotle and Natural Law*. London and New York.
- Bywater, I. (1903). 'Aristotelia IV,' *JP* 28: 241–253.
- Cahn, M. (1989). 'Reading Rhetoric Rhetorically: Isocrates and the Marketing of Insight,' *Rhetorica* 7.2: 121–144.
- Calboli Montefusco, L. (1972). 'La dottrina del *KPINOMENON*,' *Athenaeum* 50: 276–293.
- Calboli Montefusco, L. (1986). *La dottrina degli "status" nella retorica greca e romana*. Hildesheim.
- Calvo, T. (1992). 'Socrates' First Speech in the *Phaedrus* and Plato's Criticism of Rhetoric,' in Rossetti (1992): 47–60.
- Carawan, E. (2001). 'What the Laws Have Prejudged: Παράγγραφή and Early Issue-Theory,' in C. W. Wooten, ed. *The Orator in Action and Theory in Greece and Rome*. Leiden: 17–51.
- Carey, Chr. (1994). 'Artless Proofs' in Aristotle and the Orators,' *BICS* 39: 95–106.
- Carey, Chr. (1995). 'Rape and Adultery in Athenian Law,' *CQ* 45.2: 407–417.
- Carey, Chr. (1996). 'Nomos in Attic Rhetoric and Oratory,' *JHS* 116: 33–46.
- Carey, Chr. (2004). 'The Rhetoric of Diabole,' paper presented at *The interface between philosophy and rhetoric in classical Athens – an international conference organized by the University of Crete* (29–31 Oct 2004, Rethymno). [<http://eprints.ucl.ac.uk/3281/>, accessed 27.08.2013.]
- Chiron, P. (2002). *Pseudo-Aristote, Rhétorique à Alexandre*. Paris.
- Chiron, P. (2011). 'Relative Dating of the *Rhetoric to Alexander* and Aristotle's *Rhetoric*: A Methodology and Hypothesis,' *Rhetorica* 29.3: 236–262.
- Chroust, A. H. (1964). 'Aristotle's Earliest "Course of Lectures on Rhetoric",' *AC* 33: 58–72.
- Chroust, A. H. (1965). 'Aristotle's First Literary Effort: The *Gryllus*, A Lost Dialogue on the Nature of Rhetoric,' *REG* 78: 576–591.
- Clark, D. L. (1957). *Rhetoric in Graeco-Roman Education*. London.
- Classen, C. J. (2010). *Herrscher, Bürger und Erzieher: Beobachtungen zu den Reden des Isokrates*. Hildesheim.
- Clayton, E. W. (2004). 'The Audience for Aristotle's *Rhetoric*,' *Rhetorica* 22.2: 183–203.
- Cleary, J. J. and Gurtler, G. M., eds. (2009). *Proceedings of the Boston Area Colloquium in Ancient Philosophy 24 (2008)*. Leiden.
- Cohen, D. (1984). 'The Athenian Law of Adultery,' *RIDA* 31: 147–165.
- Cohen, D. (1991). *Law, Sexuality, and Society: The Enforcement of Morals in Classical Athens*. Cambridge.
- Cohen, D. (1993). 'Law, Autonomy, and Political Community in Plato's *Laws*,' *CP* 88:

301–317.

- Cole, T. (1991). *The Origins of Rhetoric in Ancient Greece*. Baltimore, MD and London.
- Cope, E. M. (1867). *An Introduction to Aristotle's Rhetoric, with Analysis Notes and Appendices*. London and Cambridge.
- Cope, E. M. (1877). *The Rhetoric of Aristotle, with a Commentary*, 3 vols. Ed. J. E. Sandys. Cambridge.
- Cornford, F. M. (1935). *Plato's Theory of Knowledge: The Theaetetus and the Sophist of Plato translated with a running commentary*. London.
- Crombie, I. M. (1963). *An Examination of Plato's Doctrines*. Vol. 2: *Plato on Knowledge and Reality*. London.
- Dalfen, J. (2004). *Platon, Werke: Übersetzung und Kommentar*, vol. 6.2. Göttingen.
- Deakin, S., Johnston, A., and Markesinis, B. (2008). *Markesinis and Deakin's Tort Law*. 6th ed. Oxford.
- De Vries, G. J. (1969). *A Commentary on the Phaedrus of Plato*. Amsterdam.
- Dimock, G. E. (1952). 'ΑΛΛΑ in Lysias and Plato's *Phaedrus*, *AJP* 73: 381–396.
- Dodds, E. R. (1959). *Plato, Gorgias: A Revised Text with Introduction and Commentary*. Oxford.
- Dover, K. J. (1968). *Lysias and the Corpus Lysiacum*. Berkeley, CA.
- Dow, J. (2007). 'A Supposed Contradiction about Emotion-Arousal in Aristotle's *Rhetoric*,' *Phronesis* 52: 382–402.
- Dufour, M. (1932). *Aristote, Rhétorique*, vol. I. Paris.
- Düring, I. (1957). *Aristotle in the Ancient Biographical Tradition*. Göteborg.
- Dworkin, R. (1985). *A Matter of Principle*. Oxford.
- Eden, K. (1986). *Poetic and Legal Fiction in the Aristotelian Tradition*. Princeton, NJ.
- England, E. B. (1921). *The Laws of Plato*, 2 vols. Manchester.
- Erickson, K. V., ed. (1974). *Aristotle: The Classical Heritage of Rhetoric*. Metuchen, NJ.
- Erickson, K. V., ed. (1979). *Plato: True and Sophistic Rhetoric*. Amsterdam.
- Erlor, M. and Brisson, L., eds. (2007). *Gorgias – Menon: Selected Papers from the Seventh Symposium Platonicum*. Sankt Augustin.
- Eucken, C. (1983). *Isokrates*. Berlin.
- Forster, E. S. (1955). 'On Sophistical Refutations,' in *Aristotle, On Sophistical Refutations, On Coming-to-be and Passing Away, On the Cosmos*. Cambridge, MA.
- Fortenbaugh, W. W. and Mirhady, D. C., eds. (1994). *Peripatetic Rhetoric after Aristotle*. New Brunswick, NJ and London.
- Fuhrmann, M. (1960). *Das systematische Lehrbuch: Ein Beitrag zur Geschichte der Wissenschaften in der Antike*. Göttingen.
- Fuhrmann, M. (1966). *Anaximenis Ars rhetorica quae vulgo fertur Aristotelis ad Alexandrum*. Lipsiae.

- Fuller, L. L. (1949). 'The Case of the Speluncean Explorers,' *Harv. L. Rev.* 62: 616–645.
- Furley, D. J. and Nehamas, A., eds. (1994). *Aristotle's Rhetoric: Philosophical Essays*. Princeton, NJ.
- Garver, E. (2009). 'Aristotle on the Kinds of Rhetoric,' *Rhetorica* 27.1: 1–18.
- Georgiadis, C. (1987). 'Equitable and Equity in Aristotle,' in Panagiotou (1987): 150–172.
- Goldschmidt, V. (1949). *La religion de Platon*. Paris.
- Grimaldi, W. M. A. (1980). *Aristotle, Rhetoric I: A Commentary*. New York.
- Grimaldi, W. M. A. (1988). *Aristotle, Rhetoric II: A Commentary*. New York.
- Griswold, C. L., Jr. (2002). 'Comments on Kahn,' in Annas and Rowe (2002): 129–144.
- Guthrie, W. K. C. (1975). *A History of Greek Philosophy*. Vol. 4: *Plato, the Man and His Dialogues: Earlier Period*. Cambridge.
- Guthrie, W. K. C. (1976). 'Rhetoric and Philosophy: The Unity of the Phaedrus,' *Paideia* 5 (Special Plato Issue): 117–124.
- Hackforth, R. (1952). *Plato's Phaedrus, Translated with an Introduction and Commentary*. Cambridge.
- Hamburger, M. (1971). *Morals and Law: The Growth of Aristotle's Legal Theory*. New edn. New York.
- Harpine, B. (1977). 'Stock Issues in Aristotle's *Rhetoric*,' *JAF* 14.2: 73–81.
- Harris, E. M. (2000). 'Open Texture in Athenian Law,' *Dike* 3: 27–79.
- Harris, E. M. (2004a). 'Le rôle de l'*epieikeia* dans les tribunaux athéniens,' *RHDFE* 82: 1–14.
- Harris, E. M. (2004b). 'More Thoughts on Open Texture in Athenian Law,' in D. F. Leão, L. Rossetti, and M. Fialho, eds. *Nomos: Direito e sociedade na Antiguidade Clássica / Derecho y sociedad en la Antigüedad Clásica*. Coimbra and Madrid: 241–263.
- Harris, E. M. (2004c). 'Did Rape Exist in Classical Athens? Further Reflections on the Laws about Sexual Violence,' *Dike* 7: 41–83.
- Harris, E. M. (2006a). *Democracy and the Rule of Law in Classical Athens: Essays on Law, Society, and Politics*. New York.
- Harris, E. M. (2006b). 'The Rule of Law in Athenian Democracy: Reflections on the Judicial Oath,' *Dike* 9: 157–181.
- Harris, E. M. and Thür, G., eds. (2008). *Symposion 2007*. Wien.
- Harris, E. M. (2009/10). 'What Are the Laws of Athens About? Substance and Procedure in Athenian Statutes,' *Dike* 12/13: 5–67.
- Harris, E. M. (2013a). *The Rule of Law in Action in Democratic Athens*. New York.
- Harris, E. M. (2013b). 'How Strictly Did the Athenian Courts Apply the Law? The Role of *Epieikeia*,' *BICS* 56.1: 25–46.
- Harrison, A. R. W. (1971). *The Law of Athens*, vol. 2: *Procedure*. Oxford.

- Hart, H. L. A. (1961). *The Concept of Law*. Oxford.
- Haskins, E. V. (2004). *Logos and Power in Isocrates and Aristotle*. Columbia, SC.
- Heath, M. (1990). 'Justice in Thucydides' Athenian Speeches,' *Historia* 39.4: 385–400.
- Heath, M. (1994a). 'The Substructure of *stasis*-Theory from Hermagoras to Hermogenes,' *CQ* 44: 114–129.
- Heath, M. (1994b). 'Zeno the Rhetor and the Thirteen *staseis*,' *Eranos* 92: 17–22.
- Heath, M. (1995). *Hermogenes, On Issues: Strategies of Argument in Later Greek Rhetoric*. Oxford.
- Heath, M. (2002). 'Hermagoras: Transmission and Attribution,' *Philologus* 146: 287–298.
- Heath, M. (2003). 'Metalepsis, *paragraphe* and the Scholia to Hermogenes,' *LICS* 2.2: 1–91. [lics.leeds.ac.uk/2003/200302.pdf, accessed on 26.08.2013.]
- Heath, M. (2004). *Menander: A Rhetor in Context*. Oxford.
- Heath, M. (2007). 'Teaching Rhetorical Argument Today,' in Powell (2007): 105–122.
- Hellwig, A. (1973). *Untersuchungen zur Theorie der Rhetorik bei Platon und Aristoteles*. Göttingen.
- Helmig, Chr. (2003). 'Die Bedeutung und Funktion von ἐπὶ δὴ in Platons *Nomoi*,' in Scolnicov and Brisson (2003): 74–80.
- Hermann, K. F., ed. (1853). *Platonis dialogi secundum Thrasylli tetralogies dispositi*, vol. 6. Leipzig.
- Herring, J. (2007). *Criminal Law*. 5th ed. Basingstoke and New York.
- Hoffmann, D. C. (2008). 'Concerning *Eikos*: Social Expectation and Verisimilitude in Early Attic Rhetoric,' *Rhetorica* 26.1: 1–29.
- Hoppmann, M. (2007), 'Statuslehre,' in G. Ueding, ed., *Historisches Wörterbuch der Rhetorik*, vol. 8. Tübingen: coll. 1327–1358.
- Huppes-Cluysenaer, L., and Coelho, N. M. M. S., eds. (2013). *Aristotle and the Philosophy of Law: Theory, Practice, and Justice*. Dordrecht.
- Hurri, S. (2013). 'Justice *Kata Nomos* and Justice as *Epieikeia* (Legality and Equity),' in Huppes-Cluysenaer and Coelho (2013): 149–161.
- Irwin, T. (1979). *Plato, Gorgias*. Oxford.
- Irwin, T. (1985). *Aristotle, Nicomachean Ethics*. Indianapolis, IN.
- Jackson, B. (1988). *Law, Fact and Narrative Coherence*. Liverpool.
- Jaeger, W. (1948). *Aristotle: Fundamentals of the History of His Development*. Tr. R. Robinson. 2d ed. Oxford.
- Jaeneke, G. (1904). *De statuum doctrina ab Hermogene tradita: Ad rhetoricae historiam symbolae*. Lipsiae.
- Janka, M. and Schäfer, Chr., eds. (2002). *Platon als Mythologe: Neue Interpretationen zu den Mythen in Platons Dialogen*. Darmstadt.
- Jhering, R. von (1872). *Der Kampf ums Recht*. Wien.

- Johnstone, S. (1999). *Disputes and Democracy: The Consequences of Litigation in Ancient Athens*. Austin, TX.
- Jones, J. W. (1956). *The Law and Legal Theory of the Greeks: An Introduction*. Oxford.
- Kahn, C. (2002). 'On Platonic Chronology,' in Annas and Rowe (2002): 93–127.
- Kasai, Y. (2010). 'A Space for Epieikeia in Greek Law,' in G. Thür, ed., *Symposion 2009*. Wien: 117–129.
- Kassel, R. (1971). *Der Text der aristotelischen Rhetorik*. Berlin.
- Kassel, R. (1976). *Aristotelis Ars rhetorica*. Berlin.
- Kennedy, G. A. (1963). *The Art of Persuasion in Greece*. Princeton, NJ.
- Kennedy, G. A. (1991). *Aristotle, On Rhetoric: A Theory of Civic Discourse*. New York and Oxford.
- Kennedy, G. A. (1994). *A New History of Classical Rhetoric*. Princeton, NJ.
- Kennedy, G. A. (2007). *Aristotle, On Rhetoric: A Theory of Civic Discourse*. 2d. ed. New York and Oxford.
- Könczöl, M. (2008). 'Law, Fact and Narratives in Ancient Rhetoric: The Case of the *causa Curiana*,' *IJSL* 21.1: 21–33.
- Könczöl, M. (2013). 'Legality and Equity in the *Rhetoric*: The Smooth Transition,' in Huppés-Cluysenaer and Coelho (2013): 163–170.
- Kraut, R. (1992). *The Cambridge Companion to Plato*. Cambridge.
- Kraut, R. (2002). *Aristotle: Political Philosophy*. Oxford.
- Kuebler, C. G. (1944). *The Argument from Probability in Early Attic Oratory*. Chicago, IL.
- Lanni, A. (2006). *Law and Justice in the Courts of Classical Athens*. New York.
- Larenz, K. (1969). *Methodenlehre der Rechtswissenschaft*. 2d ed. Berlin, Heidelberg, New York.
- Lausberg, H. (1960). *Handbuch der literarischen Rhetorik: Eine Grundlegung der Literaturwissenschaft*. München.
- Lavency, M. (1964). *Aspects de la logographie judiciaire attique*. Louvain.
- Lisi, F. L. (2001). *Plato's Laws and its Historical Significance: Selected Papers of the I International Congress on Ancient Thought, Salamanca 1998*. Sankt Augustin.
- Liu, Y. (1991). 'Aristotle and the Stasis Theory: A Reexamination,' *RSQ* 21.1: 53–59.
- Lossau, M. J. (1974). 'Der aristotelische "Gryllos" antilogisch,' *Philologus* 118: 12–21.
- MacDowell, D. M. (1978). *The Law in Classical Athens*. Ithaca, NY.
- Mandilaras, B. G. (2003). *Isocrates, Opera omnia*, 3 vols. Monachii and Lipsiae.
- Marsh, C. (2012). 'A Legal Semiotics Framework for Exploring the Origins of Hermagorean Stasis,' *IJSL* 25.1: 11–29.
- Martin, J. (1974). *Antike Rhetorik: Technik und Methode*. München.
- Marx, Fr. (1900). 'Aristoteles' Rhetorik,' *Berichte über die Verhandlungen der königlich sächsischen Gesellschaft der Wissenschaften zu Leipzig, Philologisch-*

- historische Klasse* 52: 241–328.
- Matthes, D. (1958). 'Hermagoras von Temnos 1905–1955,' *Lustrum* 3: 58–214.
- Matthes, D. (1962). *Hermagorae Temnitae testimonia et fragmenta*. Lipsiae.
- McAdon, B. (2004a). 'Plato's Denunciation of Rhetoric in the *Phaedrus*,' *RR* 23.1: 21–39.
- McAdon, B. (2004b). 'Two Irreconcilable Conceptions of Rhetorical Proofs in Aristotle's Rhetoric,' *Rhetorica* 22: 307–325.
- McCabe, M. M. (1994). 'Arguments in Context: Aristotle's Defense of Rhetoric,' in Furley and Nehamas (1994): 129–165.
- Méron, E. (1979). *Les idées morales des interlocuteurs de Socrate dans les dialogues platoniciens de jeunesse*. Paris.
- Mesch, W. (2003). 'Die philosophische Rhetorik des Gesetzgebers in Platons *Nomoi*,' in Scolnicov and Brisson (2003): 59–64.
- Mesch, W. (2007). 'Analogien und Apostrophen. Zur Bestimmung der Rhetorik in Platons *Gorgias*,' in Erler and Brisson (2007): 149–157.
- Meyer-Laurin, H. (1965). *Gesetz und Billigkeit im Attischen Prozess*. Weimar.
- Miller, F. D. (1991). 'Aristotle on Natural Law and Justice,' in D. Keyt and F. D. Miller, eds., *A Companion to Aristotle's Politics*. London: 279–306.
- Mirhady, D. C. (2011). 'Rhetoric to Alexander,' in *Aristotle, Problems: Books 20–38; Rhetoric to Alexander*. Cambridge, MA and London: 450–656.
- Mirhady, D. C. and Too, Y. L. (2000). *Isocrates*, vol. I. Austin, TX.
- Mirhady, D. C. (1990). 'Aristotle on the Rhetoric of Law,' *GRBS* 31.4: 393–409.
- Mirhady, D. C. (1991). 'Non-technical *pisteis* in Aristotle and Anaximenes,' *AJP* 112: 5–28.
- Mirhady, D. C. (1994). 'Aristotle, the *Rhetorica ad Alexandrum*, and the *tria genera causarum*,' in Fortenbaugh and Mirhady (1994): 54–65.
- Mirhady, D. C. (2006). 'Aristotle and the Law Courts,' *Polis* 23.2: 1–17.
- Mirhady, D. C., ed. (2007a). *Influences on Peripatetic Rhetoric: Essays in Honor of William W. Fortenbaugh*. Leiden and Boston.
- Mirhady, D. C., (2007b). 'Introduction,' in Mirhady (2007a): 1–18.
- Mirhady, D. C. (2008). 'The Disappearance and Reappearance of *Exetasis*,' *Mouseion* 8: 395–408.
- Mirhady, D. C. (2011). 'Aristotle and Anaximenes on Arrangement,' *Rhetorica* 29.3: 293–304.
- Momigliano, A. (1993). *The Development of Greek Biography*. Cambridge, MA.
- Morau, P. (1951). *Les listes anciennes des ouvrages d'Aristote*. Louvain.
- Moreno, A. (2007). *Feeding the Democracy: The Athenian Grain Supply in the Fifth and Fourth Centuries BC*. Oxford.
- Morrow, G. R. (1953). 'Plato's Conception of Persuasion,' *PhR* 62: 234–250.
- Morrow, G. R. (1960). *Plato's Cretan City: A Historical Interpretation of the Laws*.

- Princeton, NJ.
- Nadeau, R. (1959a). 'Classical Systems of Stases in Hermagoras and Hermogenes,' *GRBS* 2: 53–71.
- Nadeau, R. (1959b). 'Some Aristotelian and Stoic Influences on the Theory of Stases,' *SM* 26.4:
- Navarre, O. (1900). *Essai sur la rhétorique grecque avant Aristote*. Paris.
- Nehamas, A. and Woodruff, P. (1995). *Plato, Phaedrus*. Indianapolis, IN and Cambridge.
- Nightingale, A. (1993). 'Writing/Reading a Sacred Text: A Literary Interpretation of Plato's *Laws*,' *CP* 88: 279–300.
- Norlin, G. (1928). *Isocrates*, vol. I–II. Cambridge, MA.
- Notomi, N. (2007). 'Plato's Critique of Gorgias: Power, the Other, and Truth,' in Erler and Brisson (2007): 57–61.
- Ober, J. (2004). 'The Performative Audacity of Isocrates' *Antidosis*,' in D. Depew, and T. Poulakos, eds. *Isocrates and Civic Education*. Austin, TX: 21–43.
- Ophuijsen, J. M. van (1994). 'Where Have the Topics Gone?' in Fortenbaugh and Mirhady (1994): 131–173.
- Panagiotou, S., ed. (1987). *Justice, Law and Method in Plato and Aristotle*. Edmonton, AB.
- Paoli, U. E. (1950). 'Il reato di adulterio (moicheia) in diritto attico,' *SDHI* 16: 123–182.
- Papillon, T. L. (1995). 'Isocrates' *techné* and Rhetorical Pedagogy,' *RSQ* 25: 149–163.
- Papillon, T. L. (1997). 'Mixed Unities in the *Antidosis* of Isocrates,' *RSQ* 27: 47–62.
- Phillips, D. (2007). 'Trauma *ek pronoias* in Athenian Law,' *JHS* 127: 74–105.
- Poster, C. (1997). 'Aristotle's Rhetoric against Rhetoric: Unitarian Reading and Esoteric Hermeneutics,' *AJP* 118: 219–249.
- Powell, J., ed. (2007). *Logos: Rational Argument in Classical Rhetoric*. London.
- Quimby, R. W. (1974). 'The Growth of Plato's Perception of Rhetoric,' *P&R* 7: 71–79.
- Radermacher, L. (1897). 'Studien zur Geschichte der griechischen Rhetorik: I. Timäus und die Ueberlieferung über den Ursprung der Rhetorik,' *RhM* 52.3: 412–419.
- Radermacher, L. (1951). *Artium scriptores: Reste der voraristotelischen Rhetorik*. Wien.
- Rapp, C. (2002). *Aristoteles, Rhetorik*, 2 vols. Berlin.
- Rapp, C. (2009). 'The Nature and Goals of Rhetoric,' in G. Anagnostopoulos, ed. *The Blackwell Companion to Aristotle*. Oxford: 579–596.
- Raz, J. (1979). *The Authority of Law*. Oxford.
- Rechenauer, G. (2002). 'Veranschaulichung des Unanschaulichen: Platons neue Rhetorik im Schlussmythos des *Gorgias*,' in Janka and Schäfer (2002): 231–250.
- Reinhardt, T. and Winterbottom, M. (2006). *Quintilian, Institutio oratoria, Book 2*. Oxford.

- Rhodes, P. J. (2004). 'Keeping to the Point,' In E. M. Harris, and L. Rubinstein, eds. *The Law and the Courts in Classical Greece*. London: 137–158.
- Rickert, G. (1989). *EKΩN and AKΩN in Early Greek Thought*. Atlanta, GA.
- Roebuck, D. (2001). *Ancient Greek Arbitration*. Oxford.
- Romilly, J. de (1975). *Magic and Rhetoric in Ancient Greece*. Cambridge, MA.
- Roochnik, D. (1996). *Of Art and Wisdom: Plato's Understanding of Techne*. University Park, PA.
- Ross, W. D. (1959). *Aristotelis Ars Rhetorica*. Oxford.
- Rossetti, L., ed. (1992). *Understanding the Phaedrus: Proceedings of the II Symposium Platonicum*. Sankt Augustin.
- Rowe, C. J. (1992). 'La data relativa del *Fedro*,' in Rossetti (1992): 31–39.
- Rowe, C. J. (1995). *Plato, Statesman*. Warminster.
- Rowe, C. J. (2000). *Plato, Phaedrus*. 2d rev. ed. Warminster. [First ed. 1986.]
- Rowe, C. J. (2007). *Plato and the Art of Philosophical Writing*. Oxford.
- Rubinstein, L. (2008). 'Response to James P. Sickinger,' in Harris and Thür (2008): 113–124.
- Ruschenbusch, E. (1957). 'ΔΙΚΑΣΤΗΡΙΟΝ ΠΑΝΤΩΝ ΚΥΡΙΩΝ,' *Historia* 6: 257–274.
- Ryle, G. (1966). *Plato's Progress*. Cambridge.
- Saunders, T. J. (1970). *Plato, The Laws*. Harmondsworth.
- Saunders, T. J. (1991). *Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology*. Oxford.
- Saunders, T. J. (2001). 'Epieikeia: Plato and the Controversial Virtue of the Greeks,' in Lisi (2001): 65–93.
- Schakel, P. J. (1966). 'Plato's *Phaedrus* and Rhetoric,' *SSJ* 32.2: 124–132.
- Schöpsdau, K. (1994). 'Das Nachleben der *Technon synagoge* bei Cicero, Quintilian und in den griechischen Prolegomena zur Rhetorik,' in Fortenbaugh and Mirhady (1994): 192–216.
- Schütrumpf, E. (1994). 'Some Observations on the Introduction to Aristotle's *Rhetoric*,' in Furley and Nehamas (1994): 99–116.
- Shiner, R. A. (1994). 'Aristotle's Theory of Equity,' *Loy. L. A. L. Rev.* 27: 1245–1264. [Originally published in Panagiotou (1987): 173–191.]
- Shorey, P. (1933). 'On the *Erotikos* of Lysias in Plato's *Phaedrus*,' *CP* 28.2: 131–132.
- Sickinger, J. P. (2008). 'Indeterminacy in Greek Law: Statutory Gaps and Conflicts,' in Harris and Thür (2008): 99–112.
- Soeteman, A. (2009). 'Legal Gaps,' in *IVR Encyclopaedia on Jurisprudence, Legal Theory and Philosophy of Law* [ivr-enc.info/, accessed on 27.08.2013.]
- Solmsen, F. (1929). *Die Entwicklung der aristotelischen Logik und Rhetorik*. Berlin.
- Solmsen, F. (1941). 'The Aristotelian Tradition in Ancient Rhetoric,' *AJP* 62.1–2: 35–50, 169–190.

- Spengel, L. (1867). *Aristotelis Ars rhetorica*, 2 vols. Leipzig.
- Sprute, J. (1994). 'Aristotle and the Legitimacy of Rhetoric,' in Furley and Nehamas (1994): 117–128.
- Stauffer, D. (2006). *The Unity of Plato's Gorgias: Rhetoric, Justice, and the Philosophic Life*. New York.
- Stroebel, E. (1915). *M. Tullius Cicero, Rhetorici libri duo de inventione*. Lipsiae.
- Stroux, J. (1949). 'Summum ius summa iniuria,' in *Römische Rechtswissenschaft und Rhetorik*. Potsdam: 7–66.
- Taylor, A. E. (1929). *Plato: The Man and His Work*. 3rd rev. ed. London. [First ed. 1926.]
- Taylor, C. (2002). 'The Origins of Our Present Paradigms,' in Annas and Rowe (2003): 73–84.
- Thesleff, H. (1982). *Studies in Platonic Chronology*. Helsinki.
- Thesleff, H. (1989). 'Platonic Chronology,' *Phronesis* 34.1: 1–26.
- Thiele, G. (1892). 'Das Lehrbuch des Isocrates,' *Hermes* 27: 11–
- Thillet, P. (1957). 'Note sur le « Gryllos », ouvrage de jeunesse d'Aristote,' *RPFE* 147: 352–354
- Thompson, W. H. (1871). *The Gorgias of Plato*. London.
- Thompson, W. N. (1972). 'Stasis in Aristotle's *Rhetoric*,' *QJS* 58.2: 134–141.
- Throm, H. (1932). *Die Thesis*. Paderborn.
- Todd, S. C. (1993). *The Shape of Athenian Law*. Oxford.
- Too, Y. L. (1995). *The Rhetoric of Identity in Isocrates: Text, Power, Pedagogy*. Cambridge.
- Too, Y. L. (2008). *A Commentary on Isocrates' Antidosis*. Oxford.
- Trevett, J. C. (1996). 'Aristotle's Knowledge of Athenian Oratory,' *CQ* 46.2: 371–379.
- Triantaphyllopoulos, J. (1985). *Das Rechtsdenken der Griechen*. München.
- Usher, S. (1999). *Greek Oratory: Tradition and Originality*. Oxford.
- Vinogradoff, P. (1912/13). 'Freie Rechtsprechung und die athenische Demokratie,' *ARWP* 6: 1–8.
- Vinogradoff, P. (1920). *Introduction to Historical Jurisprudence*. London.
- Vinogradoff, P. (1922). *Outlines of Historical Jurisprudence*, vol 2: *The Jurisprudence of the Greek City*. London.
- Volkman, R. (1885). *Die Rhetorik der Griechen und Römer in systematischer Übersicht*. 2d ed. Leipzig.
- Waismann, F. (1951). 'Verifiability,' in G. Ryle and A. Flew, eds. *Logic and Language (First Series): Essays*. Oxford: 117–144.
- Walker, J. (2000). *Rhetoric and Poetics in Antiquity*. New York.
- Walker, J. (2011). *The Genuine Teachers of This Art: Rhetorical Education in Antiquity*. Columbia, SC.

- Walton, D. (2003). *Relevance in Argumentation*. Mahwah, NJ and London.
- Wessels, J. and Beulke, W. (2002). *Strafrecht Allgemeiner Teil*, 32nd edn. Heidelberg.
- Westerink, L. G., ed. (1970). *Olympiodori in Platonis Gorgiam commentaria*. Leipzig.
- Woerther, F. (2012). *Hermagoras: Fragments et témoignages*. Paris.
- Wolff, H. J. (1945). Review of Calhoun, G. M., *Introduction to Greek Legal Science*. *Seminar* 3: 95–107.
- Wolff, H. J. (1975). ‘Commentary: Greek Legal History—Its Functions and Potentialities,’ *Wash. U. L. Q.* 2: 395–408.
- Yunis, H. (1996). *Taming Democracy: Models of Political Rhetoric in Classical Athens*. Ithaca, NY and London.
- Yunis, H. (2009). ‘Dialectic and the Purpose of Rhetoric in Plato’s *Phaedrus*,’ in Cleary and Gurtler (2009): 229–248.
- Yunis, H. (2011). *Plato, Phaedrus*. Cambridge.